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IN THE

Supreme Court of the United States

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CONNECTION DISTRIBUTING CO., *et al.*,
Petitioners,

—v.—

ERIC H. HOLDER, JR., Attorney General,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CONNECTION DISTRIBUTING CO.; RONDEE KAMINS; JANE DOE; JOHN DOE,
Plaintiffs-Appellants,

v.

ERIC H. HOLDER, JR.,
Attorney General,
Defendant-Appellee.

No. 06-3822

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.
No. 95-01993—John M. Manos, District Judge.

Argued: September 10, 2008

Decided and Filed: February 20, 2009

Before: BOGGS, Chief Judge; KENNEDY, MARTIN, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, ROGERS, SUTTON, COOK, McKEAGUE, GRIFFIN, KETHLEDGE, and WHITE, Circuit Judges.

COUNSEL

ARGUED: J. Michael Murray, BERKMAN, GORDON, MURRAY & DEVAN, Cleveland, Ohio, for Appellants. Jonathan F. Cohn, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** J. Michael Murray, Lorraine R. Baumgardner, BERKMAN, GORDON, MURRAY & DEVAN, Cleveland, Ohio, for Appellants. Anne Murphy, Thomas M. Bondy, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

SUTTON, J., delivered the opinion of the court, in which BOGGS, C. J., BATCHELDER, DAUGHTREY, GILMAN, GIBBONS, ROGERS, COOK, McKEAGUE, GRIFFIN, and KETHLEDGE, JJ., join. KENNEDY, J. (pp. 29-54), delivered a separate dissenting opinion in which MARTIN; MOORE, COLE, CLAY, and WHITE, JJ., joined. MOORE, J. (pp. 55-63), and CLAY, J. (pp. 64-67), delivered separate dissenting opinions, in which MARTIN and COLE, JJ., joined. WHITE, J. (pp. 68-72), also delivered a separate dissenting opinion.

OPINION

SUTTON, Circuit Judge. At issue in this case is whether a provision of the Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, § 7513, 102 Stat. 4485, 4487 (codified as amended at 18 U.S.C. § 2257), violates (1) the First Amendment's free-speech guarantee, either as applied to the plaintiffs or on its face, or (2) the Fifth Amendment's privilege against self-incrimination.

I.

A.

Prior to 1988, Congress attempted to prevent the exploitation of children through pornography in at least two ways. It banned all obscene pornography, whether involving children or not. *See* Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1978) (codified as amended at 18 U.S.C. §§ 2251–2252, 2256). And it banned all other pornography involving children under the age of 18. *See* Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (codified as amended at 18 U.S.C. §§ 2251–2254); Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, 100 Stat. 3510 (codified as amended in various sections of 18 U.S.C.). No one in this case questions Congress's authority to prevent the exploitation of children in these ways, and indeed the Supreme Court has made it clear that these kinds of regulations represent a permissible means of addressing the problem. *See New York v. Ferber*, 458 U.S. 747, 756–66 (1982); *United States v. 12 200-Foot Reels of Super 8mm. Film*, 413 U.S. 123, 126, 129–130 (1973); *cf. Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 239 (2002).

In 1986, the Attorney General's Commission on Pornography determined that, although efforts to eradicate child pornography had "drastically curtailed its public presence," they "ha[d] not ended the problem." *Final Report of the Attorney General's Commission on Pornography* 134 (1986). While "[s]exual exploitation of children has retreated to the shadows," the Commission observed, "no evidence . . . suggests that children are any less at risk than before."

Id. One lingering problem, the Commission found, was that the pornography industry's proclivity for using youthful-looking models often made it difficult to discern whether underage models were being used in various publications and movies. *Id.* at 138–39.

Prompted by the Commission's report and recommendations, Congress in 1988 enacted the Child Protection and Obscenity Enforcement Act. *See Am. Library Ass'n v. Barr* (*ALA I*), 956 F.2d 1178, 1182 (D.C. Cir. 1992). Section 7513(a) of the Act, known by its codified section number as § 2257, attempted to address this problem by adding a reporting and verification requirement to the existing laws designed to prevent child pornography. Under § 2257 of Title 18, those who create materials depicting "actual sexually explicit conduct" must maintain records of their models' ages and identities. The Act defines "actual sexually explicit conduct," 18 U.S.C. § 2257(a)(1), as "sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex," *id.* § 2256(2)(A)(i), as well as bestiality, masturbation, sadistic or masochistic abuse, and the "lascivious exhibition of the genitals or pubic area of any person," *id.* § 2256(2)(A)(ii)–(v); *see id.* § 2257(h)(1).

Under the Act's reporting requirements, a regulated producer must examine, and retain a copy of, each model's or performer's photo identification. *See id.* § 2257(b); 28 C.F.R. § 75.2. It must make these records available for inspection by the government upon request. *See* 18 U.S.C. § 2257(c); *see also* 28 C.F.R. §§ 75.4–.5. And it must include a statement in its publications noting where the relevant records are kept and who maintains them. *See* 18 U.S.C. § 2257(e); *see* *also* 28 C.F.R. § 75.6.

The requirements of the Act together with the implementing regulations apply to "primary" and "secondary" "producers" of sexually explicit images. Primary producers are those who create a visual representation of actual sexually explicit conduct through videotapes, photographs or computer manipulations. 18 U.S.C. § 2257(h)(2)(A)(I); 28 C.F.R. § 75.1(c)(1). Secondary producers are (1) those who use such images for "assembling, manufacturing, publishing, duplicating, reproducing, or reissuing" any material containing regulated images, 18 U.S.C. § 2257(h)(2)(A)(ii), and (2) those who upload such images to a website or otherwise manage the content of the website, *id.* § 2257(h)(2)(A)(iii); 28 C.F.R. § 75.1(c)(2). Primary producers must "create and maintain" records relating to all of the visual depictions they produce, indexed by performer and publication, while a secondary producer may meet its burden by obtaining a copy of the primary producer's records. 28 C.F.R. § 75.2(a)–(b). In addition, no one may knowingly sell, transfer or offer for sale in interstate commerce materials containing covered images unless they contain the required labels. 18 U.S.C. § 2257(f)(4).

A regulated entity that fails to follow these requirements is subject to criminal penalties. *Id.* § 2257(f). The Act makes it a felony not to comply with these requirements, and a producer convicted of violating the Act may be fined and subject to as many as five years in prison. *Id.* § 2257(I).

Since 1988, Congress has amended § 2257 several times: in 1990, 2003 and 2006. *See* Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, §§ 301(b), 311, 104 Stat. 4816, 4816–17; Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act, Pub. L. No. 108-21, § 511(a), 117 Stat. 650, 684–85 (2003); Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 502(a), 120 Stat. 587, 625–26. In addition, the Attorney General has issued implementing regulations on three occasions. *See* 57 Fed. Reg. 15,017 (Apr. 24, 1992); 70 Fed. Reg. 29,607 (May 24, 2005); 73 Fed. Reg. 77,432 (Dec. 18, 2008). With one exception, the main provisions of the Act challenged here—the record-keeping and labeling requirements that apply to depictions of actual sexually explicit conduct, 18 U.S.C. § 2257(a)–(c), (e)—have not materially changed since 1988. The exception is a provision added to the law through the 2003 amendments, which allows law-enforcement officials to use records required by the statute in prosecuting certain other crimes. *See* Pub. L. No. 108-21, § 511(a)(1), 117 Stat. at 684. The other significant changes to the law, not directly challenged here, include: expanding the statute's scope to cover computer-based images, *see id.* § 511(a)(2), 117 Stat. at 685; *see also* Pub. L. No. 109-248, § 502(a)(1), 120 Stat. at 625, and clarifying that the record-keeping and labeling requirements do not reach those who merely provide services related to the images (such as film-processing, distribution and internet-access services), *see* Pub. L. No. 109-248, § 502(a)(4), 120 Stat. at 625–26.

B.

Founded in 1976, Connection Distributing publishes several magazines devoted to "[s]winging," a lifestyle "philosophy that holds that monogamy is incompatible with human nature and that the freedom to share sexual experiences with other like minded couples strengthens the bond of a couple's relationship." Br. at 14–15. Connection's magazines facilitate swinging by providing a venue for like-minded individuals to share their sexual interests, preferences and availability. *See Connection Distrib. Co. v. Reno* (*Connection I*), 154 F.3d 281, 285 (6th Cir. 1998). Although the magazines contain editorials and feature stories, they principally consist of advertisements —some in text alone but most in text accompanied by photographs. The advertisements serve as a form of uninhibited self-promotion, as they depict the featured individuals in graphic detail, exhibit and discuss the individuals' preferred sexual practices and invite readers to share similar experiences with them. *Id.*; *see also* Br. at 18.

Sometimes the photo advertisements depict individuals' full bodies, including their faces, but 85–90% of the advertisers do not reveal their faces. JA 393. A typical photograph thus portrays either just a featured body part or the full body with the face cropped or blocked out. *Id.*; *see, e.g.*, JA 1021–23, 1027, 1029–30, 1036, 1052, 1075, 1089–90. Individuals do not mention their full names in the advertisements but instead share their names, addresses and phone numbers with Connection. JA 383, 393–94, 397. Some advertisements mention individuals' mailing addresses, *see, e.g.*, JA 1020–23, and others mention access codes that allow readers to respond to the advertisements through Connection, *see, e.g.*, JA 1019, 1163–65, 1171–72, which acts as something of a matchmaker by forwarding written responses to individual advertisements for a fee and by allowing subscribers to use its 900-number service to contact individual advertisers, *see Connection I*, 154 F.3d at 285.

C.

In 1995, Connection filed a complaint challenging the validity of § 2257 and its implementing regulations on First Amendment grounds. Seeking declaratory and injunctive relief, it claimed that the statute was unconstitutional (1) as applied to Connection and its advertisers and (2) on its face.

The district court denied Connection's motion for a preliminary injunction, and a panel of this court affirmed. Focusing on the likelihood-of-success inquiry, the panel held that the claimants had little prospect of establishing that the statute violated the First Amendment as applied to Connection because the law amounted to a content-neutral regulation and survived intermediate scrutiny. *Connection I*, 154 F.3d at 284, 288–94, 296. The panel did not address the merits of Connection's facial challenge.

On remand, the district court granted summary judgment against Connection. A panel of this court reversed and remanded, directing the district court to "allow the parties additional discovery" and to "reconsider the matter in light of [four] recent Supreme Court precedent[s]." *Connection Distrib. Co. v. Reno (Connection II)*, 46 F. App'x 837, 837 (6th Cir. 2002). In asking the district court to reconsider its decision in the light cast by these precedents, the *Connection II* panel held that these intervening decisions did not affect its prior holding that intermediate scrutiny applied to this challenge. *Id.* at 837.

After the *Connection II* panel remanded the case and after Congress amended the statute in 2003, Connection filed an amended complaint and added three new plaintiffs: Rondee Kamins, the publisher of Connection; and Jane and John Doe, two anonymous adults who "wish to publish" in Connection's publications but have "refrain[ed] from doing so for fear of having [their] identit[ies] revealed to the government." JA 32–33. Connection again sought a preliminary injunction, and the government again sought summary judgment. The district court denied the preliminary injunction and granted summary judgment to the government.

II.

Since Congress enacted § 2257 in 1988, two federal appellate decisions have addressed First Amendment as-applied challenges to the law—one by the D.C. Circuit, *Am. Library Ass'n v. Reno* (*ALA II*), 33 F.3d 78, 87–90 (D.C. Cir. 1994), the other by this court, *Connection I*, 154 F.3d at 288–94. Today's dispute presents a renewal of Connection's as applied challenge to the law's record-keeping and disclosure provisions and a facial challenge to them. The "usual judicial practice" is to address an as-applied challenge before a facial challenge because it generally will be more "efficien[t]," because this sequencing decreases the odds that facial attacks will be addressed "unnecessarily" and because this approach avoids encouraging "gratuitous wholesale attacks upon state and federal laws." *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 484–85 (1989). We thus start by addressing the as-applied challenge.

A.

In renewing its as-applied attack, Connection argues that the Act's record-keeping and disclosure provisions, 18 U.S.C. § 2257(a)–(c), (e), suppress the free expression of Connection and any subscribers who wish to place sexually explicit personal advertisements in its magazines. We disagree—for many of the reasons that *Connection I* denied the company's request for a preliminary injunction in 1998.

Intermediate scrutiny applies. In attempting to address the problem of underage pornography, Congress did not *ban* all images of sexually explicit conduct (on the theory that some images would involve minors) or *ban* all images of sexually explicit conduct that appeared to involve minors (on the same theory). Instead of suppressing these categories of expression, Congress chose to regulate the records of those creating and distributing sexually explicit images.

Still, as Connection correctly points out, § 2257's record-keeping requirements do not entirely ignore the content of the producers' images because the requirements apply only to materials that visually depict certain listed acts. *Id.* § 2257(a); *see also id.* § 2256(2)(A). But that reality does not make the law a presumptively invalid content-based regulation of speech so long as the requirements are "*justified* without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (internal quotation marks omitted); *see City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–48 (1986); *cf. City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 434–35, 440–41 (2002) (plurality); *id.* at 448–49 (Kennedy, J., concurring in the judgment). So long in other words as the law addresses the collateral or "secondary effects" of the expression, not the effect the expression itself will have on others, it will be treated as content neutral. *See City of Renton*, 475 U.S. at 47; *Connection I*, 154 F.3d at 291. By contrast, statutes that single out speech for special treatment because of the effect its content will have on its audience amount to content-based restrictions subject to strict scrutiny. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 811–12 (2000).

Gauged by this benchmark, § 2257 is content neutral. *Connection I*, 154 F.3d at 290–91. As Connection concedes, Congress's "unanimous concern" in enacting the provision was to deter the production and distribution of child pornography. Br. at 6. Congress singled out these types of pornography for regulation not because of their effect on audiences but because doing so was the only way to ensure that its existing ban on child pornography could be meaningfully enforced. That objective not only is independent of the content of the regulated speech, but it also is a concern of the highest order, one that relates to a category of speech that the government may regulate, indeed completely suppress, based on its content. *See Ferber*, 458 U.S. at 756–66; *cf. R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–86 (1992). If Congress may suppress child pornography in its entirety due to its scarring impact on the children exploited in its production, surely it may facilitate the enforcement of laws devoted to that end by imposing a proof-of-age requirement on the producers and distributors of images of sexually explicit conduct —without triggering the most rigorous scrutiny known to constitutional law. Because the proof-of-age requirement exists in spite of, not because of, the effect Connection's speech will have on its audience and because the required records allow the enforcement of constitutionally sound laws aimed at eradicating the production of child pornography, § 2257 does not amount to a presumptively invalid content-based regulation of speech. *See Ferber*, 458 U.S. at 756–66.

Nor does the law implicate the central risk of a content-based regulation of speech: that the government has impermissibly interfered with the free exchange of ideas by imposing trade barriers on certain viewpoints but not on others. *See Ward*, 491 U.S. at 791 ("The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."); *R.A.V.*, 505 U.S. at 387; *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 295 (1984). No doubt, § 2257 favors a particular viewpoint on this issue: Congress is against child pornography and is using this law to prevent it. Although that kind of viewpoint discrimination normally would be fatal to a law, that is not true here because the Constitution allows the government to embrace this viewpoint and to act on it by imposing a complete trade barrier on the production and trafficking of this kind of speech. *See Ferber*, 458 U.S. at 756–66. What we have, then, is a valid speech-related end—eliminating child pornography—followed by a means of achieving that end, a proof-of-age requirement that refers to the content of the speech (specifically defined images) not because of its effect on the audience but because it is the kind of speech that implicates the government's ban on child pornography. That kind of sensible reference to the content of speech—how else would the government impose a proof-of-age requirement designed to address child pornography?—does not rise to the level of a presumptively impermissible content-based regulation of speech.

In addition to *Connection I*, two other federal courts have addressed the level of scrutiny applicable to a free-speech challenge to § 2257. Both share our conclusion that intermediate scrutiny applies. *See ALA II*, 33 F.3d at 85–87; *Free Speech Coal. v. Gonzales*, 406 F. Supp. 2d 1196, 1205–06 (D. Colo. 2005).

Section 2257 satisfies intermediate scrutiny. A law satisfies mid-level scrutiny if it advances a "substantial" government interest, if the measure does not "burden substantially more speech than is necessary" and if the measure leaves open "ample alternative channels for communication." *Ward*, 491 U.S. at 791, 799–800 (internal quotation marks omitted); *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994). No one disputes that the government's interest in protecting children is "substantial." And a universal age-verification requirement advances that interest in a reasonably tailored way for several reasons: It ensures that primary producers of pornography confirm that performers are of age before filming them; it permits secondary producers (who rarely will know the performers) to ensure that the individuals depicted in their publications are of age; it prevents children from attempting to pass themselves off as adults; and it creates a compliance system in which law-enforcement officers not only can identify the performers depicted in magazines and movies and verify their ages but also can eliminate subjective disputes with producers over whether a model's *apparent* age should have triggered an age-verification check. *See ALA II*, 33 F.3d at 86, 88–90; *see also Connection I*, 154 F.3d at 291–92; *Final Report of the Attorney General's Commission on*

Pornography 138–39.

In objecting to this conclusion, Connection argues that the record-keeping requirements place undue barriers on the advertisers' interests in engaging in anonymous speech. Yet Connection is not a particularly credible advocate for anonymous speech, as it *does not* permit advertisers to submit photos or other information without identifying who they are. Nothing in the statute, moreover, makes the required records available to the *public*. *Cf. Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 166–67 (2002). The advertisers must give the records only to Connection, to whom each advertiser already will have given material that most people would consider deeply personal—sexually explicit pictures of themselves with identifying names and addresses. Having entrusted Connection with these pictures and having already been required by Connection to disclose their identities, what individuals would shy away from producing verification of their ages as well? None, it seems to us, or at least none who would have a reasonable basis for doing so.

But, Connection adds, § 2257 also makes the information available to the government upon request. To the extent the advertisers are concerned that the law gives the government access to their names, addresses and other identifying information, they have no more to complain about than every taxpayer in the country. To the extent their concern is that the government somehow plans to use this information for a purpose for which it was not intended, say, to target swingers for mistreatment, they offer nothing more than two unverified anecdotes to support the point, and both anecdotes have nothing to do with the improper use of these records by government agents.

That leaves one other risk: that § 2257 undermines a central benefit of Connection's magazines—its creation of a forum for individuals to present sexually explicit pictures of themselves to the world without disclosing who they are. Under § 2257, it is true, the government has access to these images and the identities of the individuals for the limited purpose of ensuring they are of age. But under Connection's business model, so potentially does the rest of the world. The essence of the company's service is to facilitate non-platonic connections between anonymous advertisers and anonymous subscribers, something it does by giving advertisers the opportunity to respond to inquiries they have solicited and by giving advertisers the opportunity to lift the veil of anonymity, to say nothing of other veils, to these unknown inquirers. It may be that there are advertisers in Connection's magazines who have greater privacy concerns about revealing their identities to law-enforcement officers for the limited purpose of confirming their age than about revealing their identities to unknown inquirers for the purpose of facilitating a liaison. But the question is whether such individuals would have a cognizably reasonable basis for suppressing their communications in this setting, and that is something Connection's affidavits and evidence do not support.

Although Connection points out that its *paper* subscriptions have decreased since the passage of the Act in 1988, it fails to account for the possibility, acknowledged by its own expert, that the rise of Connection's internet service, internet-based chat rooms and the like explain the decline. According to Connection's editor, the company's own internet-based service went from non-existent in 1995 to doing "fairly well" by 2000. JA 590.

Connection also contends that a universal age-verification requirement is over-inclusive because it requires Connection to maintain records of individuals who are "in their 30s, 40s, 50s and beyond." Br. at 34. A rule requiring photo identification only where the depicted individual appears to be under some threshold age, it argues, would accomplish Congress's goal without burdening free expression that has little likelihood of implicating the underlying concerns of the statute. But in enacting a content-neutral proof-of-age requirement, Congress need not employ "the least speech-restrictive means of advancing the Government's interests" but must show only that the government's "interest . . . would be achieved less effectively absent the regulation" and that the measure "do[es] not burden substantially more speech than is necessary." *Turner*, 512 U.S. at 662 (internal quotation marks omitted).

No doubt requiring identification only where the individuals appear to be below a threshold age "would lead to accurate determinations in many cases." *Connection I*, 154 F.3d at 292. But it could not do so without injecting "an ineffectual subjectivity" into the proof-of-age requirement and without effectively delegating enforcement of this critical issue to the industry being regulated—two of the problems Congress permissibly sought to correct. *Id.*; *ALA II*, 33 F.3d at 90 ("The entire point of the Act is to prevent subjective determinations of age by implementing a uniform procedure that applies to all performers.").

The record in this case illustrates the problem. Although Connection maintains that "a simple look at the photos" in its magazines "make . . . clear" that the persons pictured are obviously "not minors," Br. at 34, the record proves otherwise. A brief glance at one of the issues of the magazine included in the record reveals many images (particularly the frequent depiction of mere body parts) from which no lay observer could readily discern the individuals' ages, *see, e.g.*, JA 1020, 1022–23, 1025–30, 1034, 1036–38, 1041, 1045, 1052, 1060, 1068–69, 1075–76, 1085, 1089–90, 1092, 1098–1105, as well as a number of images that appear (and in some cases purport) to portray youthful individuals, *see, e.g.*, JA 1027, 1032, 1041, 1052, 1060, 1068–89, 1075, 1089–90.

Connection counters that these images tell just part of the story: Many of the pictures it receives from would-be advertisers, when combined with other information submitted, including the advertisement text and payment details, provide enough information for Connection's editors to estimate the advertisers' ages, and the pictures are simply cropped before they appear in one of Connection's magazines. Connection's editor asserts in her affidavit that she has encountered only two cases where the age of the individual depicted was in doubt. Even if we accept all of this as true, it does nothing to diminish the subjectivity inherent in ad hoc, appearance-based judgments based on amateur photographs. Nor does it address the risks of delegating enforcement of this critical issue to the subjects of the regulation or of human error in evaluating submitted advertisements. The editors who screen submitted advertisements, notably, have no particular training in age identification, and the record reflects some instances where the editors approved advertisements that expressly describe persons below Connection's alleged self-imposed age cutoff of 21. *See, e.g.*, JA 380–82, 415–16, 422. Most importantly, however, these arguments do nothing to solve the problem of applying an appearance-based standard to advertisements that contain only isolated body parts. So long as Connection continues to be an advertising forum in which individuals may submit advertising text along with photographs of body parts, it offers no reasonable basis for ensuring that even the most earnest and law-abiding peddler of pornography can verify that its images depict adults rather than minors.

The testimony of the government's expert, Dr. Francis Biro, does not overcome this problem. True, Dr. Biro acknowledged that the "vast majority" of the photographs he examined showed individuals over 21 and "many" in their thirties, forties and fifties. JA 479. True also, it appears that Dr. Biro attempted to estimate the ages of some models based on images of body parts alone, concluding that some models were under 21 but most were not. Yet he stressed that "there's no way of establishing an exact age by looking at an individual" depicted in such images, JA 487, and he noted that determining whether a pictured model is above or below the age of majority is not an "exact science," JA 475, particularly when the picture does not capture enough relevant details. Whatever Dr. Biro can or cannot do in this respect, moreover, matters little to the resolution of this case. Even if it is true that, at least up to certain stages in a person's development, an *expert* sometimes may be able to distinguish between individuals of different ages based on an examination of mere body parts, that does not help Connection. It offers no evidence that its own staff has the capacity to make the same nuanced determinations, and its editor admitted they had no training in the subject at all.

The statute also leaves "ample alternative channels" of communication for Connection's advertisers. Although § 2257 closes one narrow door for Connection advertisers—by prohibiting them from submitting sexually explicit images to its magazines without providing photo identification—it leaves open other doors of communication. Keep in mind that, even before Congress passed the Act, Connection itself prevented its advertisers from making anonymous submissions. It required advertisers then, and it does not mind requiring advertisers now, to provide their names and addresses in connection with all submissions, and it has always said that only adults may make submissions. By requiring Connection to demand a verifiable identification with these submissions, the Act merely ensures that the advertisers are who they say they are—in terms of name, address and age. In this sense, "the Act, by its terms, bans no form of expression." *ALA II*, 33 F.3d at 88; *see Connection I*, 154 F.3d at 294. It simply adds a requirement—a photo identification—that is consistent with Connection's existing identification requirements and that therefore is unlikely to affect many adult advertisers who otherwise wish to share their photographs with Connection and who otherwise are willing to comply with Connection's existing identification and age requirements. Similar record-keeping requirements, indeed, are routinely required to assist the enforcement of tax, employment and immigration laws. *See ALA II*, 33 F.3d at 91. Once these requirements are satisfied, individual advertisers may publish their pictures anonymously to their hearts' content. Even then, moreover, another alternative remains: Connection's internet service provides an independent channel of communication, and the government does not argue that these parts of the Act and regulations reach this service.

Recent Supreme Court cases do not undermine the holding of Connection I. Connection insists that much has changed since our court first addressed these issues—that four recent Supreme Court decisions support its position, and that changes to the statute (and the implementing regulations) have impermissibly expanded the statute's reach. We disagree.

In *Free Speech Coalition*, the Court invalidated statutory provisions that criminalized the possession of any image that "appears to be[ ] of a minor engaging in sexually explicit conduct," 18 U.S.C. § 2256(8)(B) (2000); *see* 535 U.S. at 258. Yet these provisions could not be justified as remedying harms that flow from the production of child pornography because the images at issue were "produced without using any real children." 535 U.S. at 239. The government instead defended the law on the ground that the speech it singled out was unprotected by the First Amendment precisely *because* of its content. *Id.* at 249, 257. Its asserted rationales—that pedophiles might use such "virtual child pornography" to entice children to participate or might "whet their own sexual appetites with the pornographic images"—each targeted a "harm [that] flows from the content of the images, not from the means of their production." *Id.* at 241–42 (internal quotation marks omitted).

In invalidating the provisions as facially overbroad because they impermissibly abridged a "substantial" amount of protected speech, *id.* at 256, 258, the Court did not expressly say it was applying strict scrutiny to the law. But what it did can only be described as employing the tools of this most skeptical level of review, as it invalidated the provisions because they did not hew closely enough to any of the government's asserted interests in enacting the law. *See id.* at 251–58. Section 2257, by contrast, is content neutral and subject only to intermediate scrutiny. *Free Speech Coalition* did not answer (because it did not confront) the question raised by a content-neutral record-keeping requirement. The proper analogy to this case thus is not a law that criminalizes the possession of images that appear to be child pornography, but a law that requires the producers of apparent child pornography to keep their production records to allow law-enforcement officers to ensure that actual child pornography was not involved. Nothing in *Free Speech Coalition* suggests that such a law would be invalid.

At issue in *Watchtower* was an ordinance that required door-to-door canvassers and pamphleteers to register with the government in advance of their activities. *See* 536 U.S. at 154–58. In concluding that the law failed intermediate scrutiny, the Court reasoned that it affected a broad spectrum of speech, hindered an historically significant mode of communication and destroyed anonymous and spontaneous advocacy by making the registration records open to the public at large. *See id.* at 162, 165–69. Section 2257, however, does none of these things: It affects only a narrow category of speech and does so for the limited purpose of preventing speech (child pornography) that the First Amendment does not protect; it does not condition speech on announcing to the public at large what the speaker plans to say or why he plans to say it; and it does so in a setting in which the publisher of these advertisements already required the individuals to disclose their identities, *see ALA II*, 33 F.3d at 94.

Alameda Books and *Playboy Entertainment* support the application of intermediate scrutiny to this case and support the distinction that *Connection I* drew (and we draw today) between restrictions that are justified without reference to the content of the regulated speech and those that are not. *Compare Alameda Books*, 535 U.S. at 440–41 (plurality), *and id.* at 448–49 (Kennedy, J., concurring in the judgment), *with Playboy Entm't*, 529 U.S. at 811–12. *Alameda Books* also supports *Connection I* for a separate reason: It emphasizes the deference that courts owe to legislative judgments about the collateral effects of speech. *See* 535 U.S. at 437–40 (plurality); *id.* at 449 (Kennedy, J., concurring in the judgment).

Nor do any of the changes to § 2257 or its implementing regulations enhance Connection's as-applied challenge. Although Connection does not directly challenge any of the 2006 amendments to the law, it does challenge (or at least rely upon) two of the 2003 amendments. One of those amendments enlarged the list of offenses for which the government may use the records required by § 2257 as evidence, most notably by allowing the records to be used in prosecuting child-pornography, sexual-exploitation-of-children and obscenity offenses. *See* Pub. L. No. 108-21, § 511(a)(1), 117 Stat. at 684 (amending 18 U.S.C. § 2257(d)(2)). While this amendment to the law supplies the basis for plaintiffs' Fifth Amendment challenge (more on that below), it has no real bearing on Connection's First Amendment claim. If "criminal penalties for obscenity offenses are consistent with the First Amendment," even though they may deter some amount of non-obscene expression, *Alexander v. United States*, 509 U.S. 544, 557 (1993), individuals may not prevent the government from using records of *actually* obscene expression in an otherwise-lawful obscenity prosecution.

The other statutory change made by the 2003 amendments extends § 2257 to internet and other computer-based images. *See* Pub. L. No. 108-21, § 511(a)(2), 117 Stat. at 685 (amending 18 U.S.C. § 2257(h)(3), recodified at *id.* § 2257(a)). But that alteration, too, makes no difference here. Connection itself maintains that this change to § 2257 is "not self-executing" and is effective only to the extent implemented by the revised regulations. Reply Br. at 10 n.2. And as it acknowledges, the district court held that Connection's online activities are exempt under the regulations themselves, a conclusion the government has declined to challenge on appeal, *see* Br. at 19 n.6.

In dissent, Judge Moore maintains that strict scrutiny should govern this as-applied challenge. Yet at no point in its panel brief or in its supplemental en banc brief did Connection urge us to apply strict scrutiny to this case, and, with respect, the reasons given in *Connection I* by a panel of this court, in *ALA II* by the D.C. Circuit and in today's opinion justify continuing to apply mid-level scrutiny to this dispute. Judge Moore also maintains that, even if intermediate scrutiny applies, § 2257 should be invalidated, and in doing so she makes a convincing case why the law would have difficulty withstanding an as-applied attack by a mature-adults-only magazine that included photographs only of readily identifiable mature adults. But, with respect, that is not this case, and it is not Connection's publications. By allowing photographs of individuals who appear to be, and in some cases purport to be, youthful and by allowing photographs of body parts alone, Connection simply is not a standard-bearer for the mature-adults-only publication. It thus cannot be the beneficiary of the First Amendment difficulties such a claim would present.

B.

That brings us to Connection's facial challenge to the Act. A facial challenge to a law is no small matter. At stake is not an attempt to invalidate the law in a discrete setting but an effort "to leave nothing standing," *Warshak v. United States*, 532 F.3d 521, 528 (6th Cir. 2008) (en banc), to invalidate the law in each of its applications, to take the law off the books completely. That, to be sure, is the fate some laws deserve—either because the defect in the law infects all or virtually all of its applications (say, a race-based classification or a law serving an unconstitutional purpose) or because the constitutional problems cannot meaningfully be severed. *See, e.g.*, *Edwards v. Aguillard*, 482 U.S. 578, 585–594 (1987); *City of Houston v. Hill*, 482 U.S. 451, 468–69 (1987); *see also* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 279–82 (1994). But before the courts will announce such a judgment, they generally insist that the claimant show one of two things: (1) that there truly are "no" or at least few "circumstances" in "which the Act would be valid," *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also Wash. State Grange v. Wash. State Republican Party*, __U.S.__, 128 S. Ct. 1184, 1190 (2008); or (2) that a court cannot sever the unconstitutional textual provisions of the law or enjoin its unconstitutional applications. To do otherwise would amount to a judicial trespass—a court's striking of a law in all of its applications even though the legislature has the prerogative and presumed objective to regulate some of them.

This rule normally would make short work of the plaintiffs' facial challenge. Our court's rejection of the as-applied challenges to § 2257 in *Connection I* and today, to say nothing of the D.C. Circuit's rejection of a more far-reaching challenge to the law in *ALA II*, demonstrate that the law has numerous constitutional applications—a conclusion that normally would end the matter. In conventional constitutional litigation, it rarely (if ever) will be the case that a court, having upheld the constitutionality of a law in the context of the as-applied challenge before it, will proceed to strike the law in all of its applications based on hypothetical applications of the law to hypothetical individuals not before the court.

But the courts rightly lighten this load in the context of free-speech challenges to the facial validity of a law. Although "[l]itigation by hypothetical" generally is frowned upon, if not barred, in other areas of constitutional litigation, *see Warshak*, 532 F.3d at 529, it is sometimes *required* in free-speech cases. *See Broadrick v. Oklahoma*, 413 U.S. 601, 612–13 (1973); *Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 38–39 (1999); *cf. Fox*, 492 U.S. at 483–84. Here, for example, even though § 2257 may be applied constitutionally to Connection and the individual plaintiffs, the whole point of a facial challenge, or what the courts in the First Amendment context have come to call an overbreadth challenge, is to permit the claimant to strike the law in its entirety based on its application to other individuals not before the court. The overbreadth doctrine thus changes the customary rules of constitutional litigation: It relaxes the general prohibition against vicarious litigation by allowing claimants to assert the rights of third parties, and it permits a court to strike a law in its entirety even though it legitimately may be enforced in some other settings. *Broadrick*, 413 U.S. at 612–13. Due to the risk that "enforcement of an overbroad law" may "deter[] people from engaging in constitutionally protected speech" and may "inhibit[] the free exchange of ideas," the courts will strike a law on its face "if it prohibits a substantial amount of protected speech" both "in an absolute sense" and "relative to the statute's plainly legitimate sweep." *United States v. Williams*, __ U.S. __, 128 S. Ct. 1830, 1838 (2008); *see also Broadrick*, 413 U.S. at 615.

Even in free-speech cases, however, facial invalidation of a statute remains "strong medicine that is not to be casually employed." *Williams*, 128 S. Ct. at 1838 (internal quotation marks omitted). And even in this setting, facial challenges remain "disfavored" because they frequently require courts to "anticipate a question of constitutional law in advance of the necessity of deciding it" or to "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Wash. State Grange*, 128 S. Ct. at 1191 (internal quotation marks omitted); *see also id.* ("[F]acial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution."). The Supreme Court therefore has "vigorously enforced the requirement that a statute's overbreadth be *substantial* . . . relative to the statute's plainly legitimate sweep." *Williams*, 128 S. Ct. at 1838, and has placed "the burden of demonstrating . . . substantial overbreadth" on the claimant, *Virginia v. Hicks*, 539 U.S. 113, 122 (2003); *see also N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 14 (1988) ("To succeed in its [facial-overbreadth] challenge, [the plaintiff] must demonstrate from the text of [the statute] and from actual fact that a substantial number of instances exist in which the [l]aw cannot be applied constitutionally.").

In attempting to strike § 2257 in its entirety on overbreadth grounds, Connection argues that the law would be unconstitutional as applied to a magazine that depicted only "mature adult models," Supp. Br. at 3, who "are clearly and visibly not minors," Br. at 44. That may well be true, particularly if the magazine not only confined itself to self-evidently mature models but also did not permit the depiction of isolated body parts. The D.C. Circuit reached a similar conclusion, "agree[ing] with [plaintiffs'] suggestions that certain applications of the record-keeping requirements may well exceed constitutional bounds," noting that "an illustrated sex manual for the elderly" would be "an obvious example." *ALA II*, 33 F.3d at 90.

Even so, this argument does not supply a basis for invalidating § 2257. Connection has not pointed us to any such magazine or book and has not introduced any evidence showing that this third-party situation even exists. That alone is reason enough to give us pause. But even if we accepted Connection's submission, even if we assumed in other words that such magazines and books exist and that § 2257 could not validly be applied to them, that would not satisfy the company's burden for dispensing the "strong medicine" of overbreadth. At this point in the case, there is little basis for dispute that § 2257 complies with the First Amendment in most settings. As we have shown, it is constitutional as applied to Connection and the individual plaintiffs, and Connection does not dispute, and indeed all but concedes, that the law would be constitutional in most other settings. In its panel brief, Connection notes that "the congressional record arguably supports legislation" that targets "sexually explicit depictions of young looking persons," Br. at 33, and it has suggested that the law would be constitutional if it applied only to people who appear to be under 26 or under 30, *Connection Distrib. v. Keisler* (*Connection III*), 505 F.3d 545, 571–72 & n.6 (6th Cir. 2007) (Moore, J., concurring).

Nor does Connection dispute that this "legitimate sweep" of the law represents the vast majority of its applications. The report of the Attorney General's Commission on Pornography notes that "[p]erhaps the single most common feature of models is their relative, and in the vast majority of cases, absolute youth." *Final Report of the Attorney General's Commission on Pornography* 229. At a Senate Judiciary Committee hearing on § 2257 and related legislation, an administrator from the Department of Justice National Obscenity Enforcement Unit testified that "[o]ne who is 25 to 30 years of age is virtually never seen in pornographic videos or magazines." JA 120. Nothing in the record contradicts these statements or the general notion that, when people buy or share pornography, they typically do so with respect to publications or movies involving the young.

Far from contradicting these aspects of the legislative record, Connection elaborates on them, explaining that "the crux of the problem that Congress sought to address was rooted in the fact that commercial producers of sexually explicit films used youthful looking actors and actresses as young as eighteen years old and *nearly always younger than twenty five years old*." Br. at 8 (emphasis added). A central theme in Connection's fourteen-year attack on this law, indeed, is that its magazine and subscribers are unconventional—that they are "unorthodox" and "controversial" conveyors and purveyors of pornography, that swingers generally are middle-aged individuals and that their advertisements accordingly represent a "minority" of the models and performers generally featured in the materials produced by the pornography industry. Supp. Br. at 7–8, 24; Br. at 16–17.

On this record and in the face of these concessions, we have no basis for reaching any conclusion other than this: § 2257 most conspicuously applies to publications involving youthful-looking models and performers, which is the setting in which it is easiest to accept the constitutionality of these proof-of-age requirements and which at any rate is the setting in which the plaintiffs *do not* challenge the law's validity. Connection at most has identified a discrete application of the statute that may be problematic. Yet the question is not whether the claimant can imagine some "overbreadth"; it is whether the claimant can show "substantial overbreadth."

At the panel stage of this case, the judges on their own initiative raised a second overbreadth problem, one not raised in Connection's amended complaint, in its briefs before the district court or in its briefs before the panel. By its terms, the panel observed, the statute seems to apply to a couple who produced, but never distributed, a home video or photograph of themselves engaging in sexually explicit conduct, because the record-keeping requirements apply to anyone who produces sexually explicit images, *see* 18 U.S.C. § 2257(a)–(b), regardless of whether the images are sold, traded, or otherwise distributed, *see id.* § 2257(h)(2)(A)(i)–(iii); *Connection III*, 505 F.3d at 552.

Invoking the constitutional-avoidance doctrine and the rule of lenity, the government points to language in the statute suggesting that it does not cover this situation. Supp. Br. at 20 (noting the statute's references to a producer's "business premises," to the involvement of multiple performers and to contractual or similar relationships between producers and performers). The avoidance doctrine no doubt often goes a long way in defusing potential conflicts between Congress's enactments and the Constitution. Whether the doctrine allows us to read the statutory text in the way the government proposes, however, is far from clear. Viewed in isolation, the Act's reference to "business premises" might suggest that the statute draws a line between commercial and non-commercial pornography. Yet subsequent amendments to the law, apparently in response to a Tenth Circuit decision addressing a related point, *Sundance Assocs., Inc. v. Reno*, 139 F.3d 804 (10th Cir. 1998), make it clear that the law covers commercial *and* non-commercial pornography. *See* 18 U.S.C. § 2257(h)(2)(A), (h)(2)(B)(iii). Peddlers of child pornography, it turns out, are as apt to do so for non-pecuniary purposes as for other motives, which is why Congress extended the law to this setting. *Final Report of the Attorney*

General's Commission on Pornography 134–35.

Once we eliminate the possibility of a commercial/non-commercial line of coverage, that leaves at least two other possibilities that would exclude coverage in this setting. One is that the statute applies only to pornography created for sale or trade, an interpretation that would not apply to pornography created by an adult couple for home consumption. In his appellate briefs in this case and in the preamble to a recently promulgated rule amending the regulations implementing § 2257, the Attorney General has embraced this view, construing the statute as "limited to pornography intended for sale or trade," 73 Fed. Reg. at 77,456. But in view of the terms of the statute, *see* 18 U.S.C. § 2257(a), (b), (h)(2)(A), (h)(2)(B)(iii), the existence of a textual hook for this interpretation is open to question. The other possibility is that, even if the law applied to such a couple, it would rarely matter because most (if not all) of the identifying and record-keeping information required by the Act necessarily would lie within the four corners of the couple's home, which is where the law requires it to be kept. *See Id.* § 2257(c). But in view of the labeling requirements of the implementing regulations, 28 C.F.R. § 75.6(b), it remains unclear whether such a couple would satisfy these requirements without knowing they were doing so.

Given these complexities and given the absence thus far of any such application of the statute, we see no need to resolve the point one way or another, and thus we do not take a stand on the issue. Let us instead assume for the sake of argument that the panel was right—that the law's record-keeping and disclosure requirements would apply to sexually explicit images produced by such a couple. And let us assume for the sake of argument that the panel was right in concluding that this application of the law would be unconstitutional. Does it follow that the panel was also correct in holding that this as-applied defect requires the invalidation of § 2257 in its entirety? Not in our view.

First, we have no record, and therefore no context, for assessing the *substantiality* of this overbreadth problem. Because the plaintiffs did not raise this theory of unconstitutionality in their complaint or in the district court, the record is utterly barren about whether some, many, indeed any, American couples are affected by this proposed application of the statute—and, if so, in what ways. That contextual vacuum by itself counsels in favor of choosing discretion over valor in dealing with this overbreadth challenge. *See N.Y. State Club Ass'n*, 487 U.S. at 14 (rejecting First Amendment overbreadth challenge to local antidiscrimination law, which the plaintiffs asserted could not constitutionally apply to purely private clubs, where "[n]o record was made" concerning those clubs, the Court was "not informed of the characteristics of any particular clubs" and thus it "[could]not conclude that the [l]aw threatens to undermine the associational or expressive purposes of any club, let alone a substantial number of them").

But that is just half of the problem. The record not only presents a contextual vacuum; it also presents a law-enforcement vacuum, making this debate all the more abstract and all the more vulnerable to inaccurate rather than accurate judicial decision-making. The government has informed us that, during the twenty years that § 2257 has been in existence, it has never been enforced in this setting. It has informed us that it has no intention of enforcing the law in this setting—as proved by the fact that the Attorney General, a *party* to this case and the sole defendant in it, has taken the position that the statute "does not apply to images that an adult couple produces of its own intimate activity for the couple's private enjoyment at home." Supp. Br. at 20. And it has informed us that, in connection with the promulgation of a final rule amending the regulations implementing § 2257, the Attorney General has stated in the preamble to the new regulations that "[t]he statute . . . is limited to pornography intended for sale or trade." 73 Fed. Reg. at 77,456.

Connection offers no evidence of a contrary enforcement record, and we are not aware of any case law, regulations, even news reports, mentioning the possibility of a different application of the statute—at least until the panel raised the idea during the third appeal of this case. Sure enough, there may be a first time for everything. And we do not mean to suggest that a couple potentially affected by this hypothetical application of the law could not bring a declaratory-judgment action or an as-applied challenge to the law today, whether in their own names or as an anonymous John and Jane Doe. But that does not mean *litigation by proxy* makes sense in this setting, one that has yet to come to pass, one that may never come to pass and one that presents *three* layers of abstraction: (1) no record of any kind about this form of middle-aged sexual expression; (2) no record of its prevalence; and (3) no idea how a government that for twenty years has not applied the law in this setting, that indeed disclaims the authority to apply the law in this setting, ultimately would choose to apply the law if it ever changed its mind. Overbreadth plays several essential roles in protecting free speech, but this simply is not one of them.

Second, this hypothetical application of the statute, even when it is considered on this thin record, makes no difference to the outcome of this case. Even if we assume that the statute covers such a video and even if we assume that the First Amendment would not permit Congress to impose its record-keeping requirements in this unusual setting, that would not materially advance Connection's efforts to show *substantial* overbreadth. What makes this hypothetical seemingly helpful to Connection—the extension of the statute to a setting that is far removed from the underlying purposes of the Act, that makes little sense and that raises constitutional red flags—undermines much of its significance. Connection offers no argument, much less proof, that there are a meaningful number of individuals who would be adversely affected by this construction of the law. Which takes us back to the central point: The question in the context of a facial challenge is not whether a court can conceive of one or more unconstitutional applications of a statute; it is whether the alleged unconstitutional sweep of the statute is "*substantial* . . . relative to the statute's plainly legitimate sweep." *Williams*, 128 S. Ct. at 1838. No such showing has been made here. The record and the plaintiffs' concessions establish that the overwhelming majority of applications of § 2257 do not offend the free-speech guarantees of the Constitution, and a "vigorous" enforcement of the "substantial overbreadth" requirement prohibits a party from leveraging a few alleged unconstitutional applications of the statute into a ruling invalidating the law in all of its applications. Because the *burden rests with Connection* to establish substantial overbreadth, *see Hicks*, 539 U.S. at 122; *N.Y. State Club Ass'n*, 487 U.S. at 14, and because Connection has produced no evidence on this score, it simply has not supplied a basis for knocking § 2257 out in its entirety.

The concept of "substantial overbreadth," we acknowledge, has some elusive qualities, and it likely is the key source of our disagreements in this case. A first run at applying the Supreme Court's cases in this area might suggest a more concrete approach than we have offered—of placing, say, the number of overall applications of the statute in the denominator and the number of unconstitutional applications of the statute in the numerator. With this ratio in hand, we could identify a certain threshold of unconstitutional applications—of, say 10%, 25%, 50% or more—and label that threshold as the turning point for a finding of substantial overbreadth.

But the Supreme Court has never gone down this road—and with good reason. Substantial overbreadth involves not just an inquiry into the legitimate and illegitimate sweep of a statute; it also involves an inquiry into the "absolute" nature of a law's suppression of speech. Together, these questions require as much in the way of judgment as they do a comparison between the constitutional and unconstitutional applications of a law. Ultimately, the critical question is this: Under what circumstances is it appropriate to invalidate a law in all of its applications when its invalidity can be shown (or assumed) in just some of its applications? When we think about the problem that way, it is hard to understand who is being hurt by resisting the plaintiffs' call to invalidate the statute on its face. The middle-aged couple is not likely to be chilled by the statute. Over twenty years and numerous administrations, the statute has never been enforced in this setting, and the Attorney General has publicly taken the position that he will not enforce the statute in this setting. But even if this track record does not suffice to give the hypothetical couple peace of mind, they have a remedy—a John and Jane Doe as-applied challenge to the law, together with attorney fees if they win. What, then, of the hypothetical pornography magazine or sex manual that involves only the middle-aged and the elderly? There, too, we have not been told of any enforcement efforts in this area, and *ALA II* and today's case offer ample indications that such an application of the law would run into serious First Amendment problems.

On the other side of the equation, we are being asked to invalidate a law in its entirety based on a worst-case scenario that, to our knowledge, has never occurred, that may never come to pass and that has not been shown to involve a materially significant number of people. How strange, moreover, that we would impose such a remedy *after* the government has withstood every as-applied First Amendment challenge to the law by the real people and businesses to whom it most naturally has been applied over the last twenty years.

Judge Kennedy's dissent notes, correctly, that there are costs to requiring case-by-case adjudication: Some individuals who are wrongfully chilled from speaking may decline to seek redress because litigation is time-consuming and, if they lose, it can be expensive. *See Hicks*, 539 U.S. at 119. But there are serious costs to the alternative, too. Because courts are ill-equipped to "resolve questions of constitutionality" in "every conceivable situation which might possibly arise," *Gonzales v. Carhart*, __ U.S. __, 127 S. Ct. 1610, 1639 (2007), we risk deciding *wrongly* if we answer abstract questions without a proper factual record and with only our judicial imagination to guide us. *See United States v. Raines*, 362 U.S. 17, 22 (1960). And sustaining even a meritorious facial challenge to "a law that in some of its applications is perfectly constitutional . . . has obvious harmful effects" because it throws out the bad with the good, including what we and all of the parties agree is a perfectly legitimate effort to prevent child pornography when applied to publications and films involving youthful-looking models. *Williams*, 128 S. Ct. at 1838. These costs help to explain why "[a]s-applied challenges are the basic building blocks of constitutional adjudication." *Carhart*, 127 S. Ct. at 1639 (quotation marks omitted) (alteration in original). So long as overbreadth remains "strong medicine that is not to be casually employed," *Williams*, 128 S. Ct. at 1838 (internal quotation marks omitted), and remains a measure only of "last resort," *Broadrick*, 413 U.S. at 613, it has no application here.

Judge Kennedy's dissent notes, correctly again, that the absence of a prior application of the law to private couples who create and keep sexually explicit images in their homes does not by itself doom this facial-overbreadth challenge. A litigant interested in bringing an overbreadth challenge to a law need not await its application to every conceivable fact pattern before filing suit. But that does not mean the government's track record *in this case*—of never applying the law in this setting over twenty years and of disclaiming any authority and intention of doing so—has no role to play in the exercise of our *judgment* about whether to strike this law in its entirety. That enforcement vacuum together with the absence of any record support for the plaintiffs' position contribute to the utterly abstract nature of this debate, surely something we may consider in deciding whether to grant overbreadth relief. And in exercising that judgment, the Supreme Court tells us to consider whether the alleged overbreadth is "substantial" and "real," *Broadrick*, 413 U.S. at 615, the whole point being to determine whether "there [is] a realistic danger that the statute itself will significantly compromise" the First Amendment rights of the parties not before us, such as the hypothesized private couples, *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984). Surely one factor to consider in assessing the "realistic danger" of inhibiting speech, but hardly the only factor to consider, is the past practices and future prospects of enforcement. *See, e.g.*, *Regan v. Time, Inc.*, 468 U.S. 641, 651–52 & n.8 (1984) (plurality opinion); *Faustin v. City & County of Denver*, 423 F.3d 1192, 1201 (10th Cir. 2005); *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1368 (10th Cir. 2000).

One other point deserves mention. At the panel stage, the court reasoned that, once it had identified one unconstitutional application of the law (here to the hypothetical couple), it must invalidate the entire statute unless it could sever an offending portion of the *text* from the rest of the statute. That is one option when a constitutional problem has been identified, but it is not the only option. A court may enjoin the unconstitutional *applications* of the law while preserving the other valid applications of the law. *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504–05 (1985); *United States v. Grace*, 461 U.S. 171, 180–83 (1983); *see also Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328–29, 332 (2006); *cf.* Gillian E. Metzger, *Facial Challenges and Federalism*, 105 Colum. L. Rev. 873, 884–87 (2005). Or a court may assume for the sake of argument that certain applications of the law would be unconstitutional but still reject a facial challenge. *See Hicks*, 539 U.S. at 122–24; *N.Y. State Club Ass'n*, 487 U.S. at 14–15; *Ferber*, 458 U.S. at 773–74; *Broadrick*, 413 U.S. at 617–18; *cf. Carhart*, 127 S. Ct. at 1639. That last path is the one we have followed here.

III.

In their amended complaint, the three individual plaintiffs challenge the validity of § 2257 under the Fifth Amendment's Self-Incrimination Clause. As amended in 2003, the statute allows the government to use the records Connection must maintain as evidence not only of violations of § 2257 but also as evidence to prove violations of other obscenity and pornography-related laws. *See* 18 U.S.C. § 2257(d)(2). Because these records could implicate them in crimes, plaintiffs argue that this provision violates their privilege against self-incrimination. The district court rejected this argument on the merits, concluding that two of the three factors we consider in evaluating a self-incrimination challenge to recordkeeping requirements cut against the plaintiffs: The statute's primary purpose is regulatory—as it encompasses largely lawful activity, not a "highly selective and inherently suspect group of people"—and "merely fulfilling the records requirements does not demonstrate involvement in criminal activity." JA 60–62 (internal quotation marks omitted); *cf. United States v. Alkhafaji*, 754 F.2d 641, 643 (6th Cir. 1985).

We need not resolve the merits of the plaintiffs' self-incrimination claim, however, because it is not ripe. The ripeness doctrine, we have recently explained, "is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction" and "serves to avoid[ ] . . . premature adjudication of legal questions," thus "prevent[ing] courts from entangling themselves in abstract debates that may turn out differently in different settings." *Warshak*, 532 F.3d at 525 (internal quotation marks omitted) (omission and first alteration in original). To meet their burden of showing their claim is ripe for review, *see Renne v. Geary*, 501 U.S. 312, 316 (1991), the plaintiffs must show (1) that "the claim [is] fit . . . for judicial decision in the sense that it arises in a concrete factual context and concerns a dispute that is likely to come to pass" and (2) that "the hardship [to them] of withholding court consideration" outweighs the costs of allowing "litigation by hypothetical," *Warshak,* 532 F.3d at 525, 529 (omission in original).

The plaintiffs fall short on both fronts. As for fitness, the Supreme Court has previously held that a pre-enforcement self-incrimination challenge to a reporting requirement is "premature" even when the plaintiff insists that he "intend[s] to engage" in the conduct that triggers the requirement—so long as the plaintiff has yet to assert a privilege claim in response to a government demand for disclosure. *Cal. Bankers Ass'n v. Schultz*, 416 U.S. 21, 72–74 (1974); *see also Trs. for Alaska v. EPA*, 749 F.2d 549, 560 (9th Cir. 1984) (dismissing as "unripe" a pre-enforcement self-incrimination challenge to self-monitoring, reporting and record-keeping requirements contained in federal pollutant-discharge permits where no one contended those requirements had been "improperly applied in an actual case"). That is precisely the case here. As the record now stands, we simply "have no idea whether or when" the Attorney General will attempt to inspect any of Connection's records, let alone refuse to respect a proper claim of privilege. *Warshak*, 532 F.3d at 526 (internal quotation marks omitted); *cf. Free Speech Coal. v. Gonzales*, 483 F. Supp. 2d 1069, 1081 (D. Colo. 2007) (dismissing on standing grounds the plaintiffs' selfincrimination attack on § 2257 because they failed to show a concrete injury, as they "ha[d] not produced any evidence that they have ever been subjected to an inspection").

As for hardship, the plaintiffs have not shown that "withholding court consideration" until a concrete conflict arises will prejudice them in any material way. They do not face the kind of dilemma that confronted the petitioners in *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965). There, after unsuccessfully asserting their self-incrimination privilege to the relevant government agency, the individuals were forced to make a winless choice between complying with the registration requirements "without a [judicial] decision on the merits of their privilege claims" or declining to do so and "risk[ing] onerous and rapidly mounting penalties while awaiting the Government's pleasure whether to initiate a prosecution against them." *Id.* at 75–76. At least until the Attorney General attempts to obtain § 2257 records from these individuals, they face no greater risk of prospective harm than a claimant concerned that the government will violate his Fourth Amendment rights in future searches. *Cf. Warshak*, 532 F.3d at 533. At this point, their Fifth Amendment claim simply is not ripe.

IV.

For these reasons, we affirm the district court's order granting summary judgment to the government.

DISSENT

KENNEDY, Circuit Judge, dissenting. Enforcement has never been the touchstone of the substantiality of overbreadth inquiry.[1] On the contrary, the Supreme Court understands the "danger[]" inherent in the possibility that "the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *City of Houston v. Hill*, 482 U.S. 451, 466 (1987) (quoting *United States v. Reese*, 92 U.S. (2 Otto) 214, 221 (1876)). A very purpose of the overbreadth doctrine is to invalidate those laws whose statutory language gives such sweep that law enforcement can selectively enforce the law on the basis of the speech's content.[2] *See Long Island Vietnam Moratorium Comm. v. Cahn*, 437 F.2d 344, 350 (2d Cir. 1970) (holding a statute unconstitutional on its face because it "vests local law enforcement officers with too much arbitrary discretion[,] . . . permit[ting] only that expression which local officials will tolerate" as a result of the overbreadth of its statutory language, "render[ing] the statute unconstitutional"). To uphold a law based on the statement of an Assistant United States Attorney in this case, Maj. Op. at 22, while at the same time all but conceding that the law is unconstitutional as applied to private couples,[3] Maj. Op. at 24, and that the law's record-keeping application to private couples with its criminal penalty falls within the statute's text, Maj. Op. at 20-21, is to eviscerate the purpose for overbreadth. *See Am. Civil Liberties Union v. Reno*, 929 F. Supp. 824, 857 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997) (Sloviter, J.) (rejecting the "troubl[ing]" argument that "the First Amendment should [] be interpreted to require [the court] to entrust the protection it affords to the judgment of prosecutors" when "[p]rosecutors come and go" but "[t]he First Amendment remains to give protection to future generations"). As a matter of pure logic, overbreadth exists to limit the enforcement capabilities of the Attorney General, and therefore overbreadth's application cannot be limited by an Assistant United States Attorney's or even an Attorney General's professed scope of enforcement.

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[1] I focus on the overbreadth challenge because the added plaintiffs, the Does, are those who refrained from speaking. Maj. Op. at 6, and the full extent of the case presented to us is not only Connection's claim but the claims of the Does and other private couples producing and keeping sexually explicit images in their own homes. Section 2257 criminalizes the private production of sexually explicit images if a contemporaneous record is not made, which is a prerequisite to the Does' claims that they cannot publish the images they have created in Connection. The Does' claims implicate two forms of speech here: creation of sexually explicit images and their publication.

[2] The Supreme Court has held that sexually explicit images of adults constitute speech and are protected under the First Amendment freedom of speech guarantee. *See Kaplan v. California*, 413 U.S. 115, 119 (1973).

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[3] "Private couples" are those adults creating and keeping sexually explicit images in their own homes. *See* Maj. Op. at 20. The statute makes it a crime even for private couples to produce sexually explicit images without first compiling records, affixing statements, and then subsequently maintaining such records for at least five years with law enforcement being able to enter the home at least once every four months to inspect the records. The punishment under § 2257 provides for imprisonment for up to five years and fines.

Keep in mind that overbreadth exists in the First Amendment context as an exception to the normal rules of standing, allowing parties before the court to argue on behalf of those not present. *Prime Media, Inc. v. City of Brentwood*, 485 F.3d 343, 349-50 (6th Cir. 2007). However, this exception to standing only amounts to "an exception to the usual prudential standing requirement 'that a party may assert only a violation of its own rights,'" *id.* (quoting *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392-93 (1988)), not an exception to the constitutional standing requirements prescribed by Article III § 2, *id.* (citing *Am. Booksellers Ass'n*, 484 U.S. at 392-93). No one challenges Connection's prudential or constitutional standing to challenge § 2257 in its entirety. *Cf. Prime Media, Inc.*, 485 F.3d at 350 (requiring the party before the court to have an injury in fact with respect to all of the challenged provisions of a statute).

Many courts have rejected the argument that lack of enforcement means no injury-in-fact in the context of first-party standing. "[O]nly when litigants seek pre-enforcement review of antiquated laws of purely 'historical curiosity'" can the threat of prosecution be deemed speculative. *Navegar, Inc. v. United States*, 103 F.3d 994, 1000 (D.C. Cir. 1997) (quoting *Doe v. Duling*, 782 F.2d 1202, 1206 (4th Cir. 1986)). And yet, even though in *Epperson v. Arkansas*, 393 U.S. 97, 101-02 (1968), the plaintiff had not been charged, "no record of any prosecutions in Arkansas" under the Arkansas statute existed, and the statute was no more than a "curiosity," the Court still held that the plaintiffs had standing to bring a First Amendment freedom of religion challenge. Similarly, the Court held that physicians had standing to challenge a state's abortion statutes even though "the record [did] not disclose that any one of them [had] been prosecuted, or threatened with prosecution." *Doe v. Bolton*, 410 U.S. 179, 188 (1973). The Sixth Circuit has held that the statutory language itself, where the plaintiff falls within its purview such that the plaintiff "would be subject to application of the statute," in and of itself supplies "the fear of prosecution [] reasonably founded in fact." *Planned Parenthood Ass'n v. City of Cincinnati*, 822 F.2d 1390, 1395 (6th Cir. 1987). The majority does not contest § 2257's application to the private couple on the statute's plain face. Maj. Op. at 20-21.

Connection as the plaintiff provides the uncontroverted injury-in-fact that allows the case to be heard. Connection's injury-in-fact allows it to stand before the court, but it is the chilling effect on the private couple, the "deficiency which may not affect [the litigant] but only others," which allows Connection to challenge a law on overbreadth grounds on behalf of the private couple, *Morrison v. Bd. of Educ.*, 521 F.3d 602, 610 (6th Cir. 2008) (quoting *United Presbyterian Church v. Reagan*, 738 F.2d 1375, 1379 (D.C. Cir. 1984)). Indeed, third-party standing for overbreadth challenges exists solely out of concern for a challenged law's chilling effect, so that where there is no chilling of parties not before the court, there is no third-party standing to assert the rights of those parties. *See Pitt News v. Fisher*, 215 F.3d 354, 364 (3d Cir. 2000) ("The Supreme Court has recognized that, in certain cases, the risk that a third party's free speech may be 'chilled' by an overbroad statute or ordinance may warrant the grant of [third-party] standing . . . .") (quoting *Harris v. Evans*, 20 F.3d 1118, 1122 n.5 (11th Cir. 1994), *cert. denied*, 513 U.S. 1045 (1994)).

While the likelihood of prosecution is the appropriate inquiry under the imminence prong of injury-in-fact, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), under the proper inquiry of chilling effect, we must not only look at the possibility of enforcement but also its severity, an important point which the majority does not address. Section 2257 imposes criminal sanctions on speech, making a violation of the statute a felony, which magnifies its chilling effect. *Cf. Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 667 (2004) (where a statute "does not condemn as criminal any category of speech[,] . . . the potential chilling effect is eliminated, or at least much diminished"). Again, the majority does not contest § 2257's application to the private adult couple on the statute's plain face. Maj. Op. at 20-21. "[W]here the statute unquestionably attaches sanctions to protected conduct, the likelihood that the statute will deter that conduct is ordinarily sufficiently great to justify an overbreadth attack." *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 n.19 (1984) (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217 (1975)). No doubt "a law imposing criminal penalties on protected speech is a stark example of speech suppression" such that "even minor punishments can chill protected speech." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002) (citing *Wooley v. Maynard*, 430 U.S. 705 (1977)). While *Wooley* dealt with a misdemeanor statute whose violation resulted in the levying of an initial fine of $25 and a jail sentence of 15 days, 430 U.S. at 708, punishment under § 2257 provides for imprisonment for up to five years and fines, 18 U.S.C. § 2257(i), for violation of its recordkeeping requirement. The gravity of imposing criminal sanctions–and criminal sanctions of this magnitude–on protected speech cannot be overstated.

Moreover, as the majority points out, Congress amended § 2257 in 2006 specifically to expand the statute to include commercial and non-commercial sexually explicit images. Maj. Op. at 20-21. Child pornography, of course, is not only sold but traded and produced and consumed privately, all of which Congress intended to reach with this statute. The specific targeting of non-commercial sexually explicit images then makes uncertain what exactly the Assistant United States Attorney means in this case when he says that he would not enforce it to cover the hypothetical couple at issue. Maj. Op. at 22. This representation was made for the first time at the en banc oral argument. The majority acknowledges that neither the commercial-non-commercial line nor the sale-and-trade-private-use line as an attempted clarification offered by the newly promulgated regulations, 73 Fed. Reg. 77,421, 77,456 (Dec. 18, 2008), finds a basis in the statutory text. Congress's intent embodied in the statute is contrary–it intends to eradicate all forms of child pornography without regard to whether it is sold, traded, or kept privately in the home. Maj. Op. at 20-21. The statute criminalizes the *production* of sexually explicit images without the contemporaneous development of records, a completely different matter from how the images are *used.* Therefore, the regulations do not change what is criminal, they merely enter into the Federal Register the promises made by the Assistant Attorney General regarding their intentions on how they will enforce the law. Congressional motives emphasize that even the attempted clarification offered by the new regulations is suspect because the Attorney General does not explain how it will enforce § 2257 on traded sexually explicit imagery but not that shared for free. Because federal criminal statutes outlast Attorneys General, the reach of the statute's text, not a promise from law enforcement nor a recently enacted regulation, is the proper focus of our inquiry.

More than simply the imposition of criminal sanctions on protected speech, § 2257 chills even those private couples who might otherwise engage in protected speech and follow its record-keeping requirements. Before producing sexually explicit images in their own homes, private couples must compile records, affix statements, and then subsequently maintain such records for at least five years. Indeed, § 2257 not only requires record-keeping, § 2257(a), but also the making of those records available for periodic inspection by the government, § 2257(c), allowing the government to inspect the location where records are kept at least once every four months, 28 C.F.R. § 75.5, requirements which are especially onerous on those who, as here, wish to engage in private and anonymous speech. "Privacy of communication is an important interest" and "fear of public disclosure of private conversations might well have a chilling effect" on that important interest "even without the reality" of surreptitious monitoring. *Bartnicki v. Vopper*, 532 U.S. 514, 532-33 (2001). Registration requirements have been recognized to have a significant chilling effect on speech because they force those who would speak anonymously "to forgo their right." *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 166 n.14 (2002). The Supreme Court has noted the long and illustrious history of anonymous speech while at the same time pointing out that "identification requirement[s] [ ] tend to restrict freedom . . . of expression." *Talley v. California*, 362 U.S. 60, 64 (1960). The record-keeping requirement of § 2257 mandates not only record-making before engaging in protected speech between "neighbors," *Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 536 U.S. at 166, but also the universality of the record-keeping requirement mandates record-making before engaging in protected speech between friends, lovers, and a husband and wife.

While the records required by § 2257 will not necessarily be publicly available, *cf.* Maj. Op. at 9 (citing *Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 536 U.S. at 166-67) (no "undue barriers on [those] engaging in anonymous speech" exist because "nothing in the statute makes the required records available to the *public*"), the statute does provide for government access and does not provide for confidentiality. *See Shelton v. Tucker*, 364 U.S. 479, 486 (1960) (suggesting that a statute requiring disclosure without a confidentiality guarantee chills speech). True, the Court in *Watchtower Bible & Tract Society of New York* discussed anonymity with respect to the canvasser vis-a-vis the general public, but not to be ignored is the Court's point that anonymity with respect to the canvasser vis-a-vis the government is important as well. 536 U.S. at 166-67. The Court emphasized that abhorrent to the First Amendment is the "very notion" that before engaging in "everyday public discourse[,] a citizen must first inform the government . . . ." *Id.* at 165-66. The *Watchtower Bible & Tract Society of New York* Court delves into a discussion of the anonymous distribution of handbills, *id.* at 166, citing cases such as *Talley* which detail the "important role" anonymous pamphlets have had in circulating "literature critical of the government" and the concomitant punishment meted out by the *government* of those discovered to have distributed these pamphlets anonymously. *Talley*, 362 U.S. at 64-65. The historical protection of anonymity was then of the dissident versus the government rather than between the dissident and the public-at-large. *See id.* Without a doubt then, mandated government disclosure chills both anonymous public and private speech–that is, it chills speech that may be in disfavor with the government–and it does so whenever the government requires disclosure even if only to the government itself.

The Court in *Watchtower Bible & Tract Society of New York* also explicitly rejected the argument that the majority appears to make, which reasons that if individuals are willing to expose themselves in sexually explicit imagery, then they can be made to expose other identifying information. *See* Maj. Op. at 9-10. In *Watchtower Bible & Tract Society of New York*, petition circulators went door-to-door seeking signatures, and thus they revealed their physical identities. 536 U.S. at 167. Yet the Court held that "[t]he fact that circulators revealed their physical identities did not foreclose our consideration of the circulators' interest in maintaining their anonymity." *Id.* In coming to this conclusion, the Court again pointed to the historical use of petitioning in drumming up interest in unpopular causes, *see Talley*, 362 U.S. at 64-65, when it wrote that the registration requirement "may preclude such persons from canvassing for unpopular causes," *Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 536 U.S. at 167. This again draws attention to the historical protection of anonymity as against the government, not the general public, and therefore an individual may be willing to expose his or her physical presence in sexually explicit imagery or otherwise which acquaintances may recognize, and still retain an interest in not disclosing identifying information to the government. *Cf.* Maj. Op. at 13 (citing *Am. Library Ass'n v. Reno* (*ALA II*), 33 F.3d 78, 91 (D.C. Cir. 1994)) (making the inapposite comparison between identification requirements in the tax context and identification requirements in the First Amendment context where *ALA II* dealt with an as-applied challenge by trade organizations and corporations producing commercial sexually explicit imagery).

In an effort to rebut this argument, the majority returns to its central point that the government has not yet abused its power under § 2257 to prosecute those who wish to engage in anonymous speech. Maj. Op. at 10. But in the Supreme Court's anonymous pamphletting or canvassing jurisprudence, the Court has not hesitated to strike down laws that hinder those forms of anonymous speech in the absence of incidents of government abuse of dissidents under the particular statute before the Court. *Compare Watchtower Bible & Tract Soc'y. of N.Y., Inc.*, 536 U.S. at 166-67 (invalidating a law on overbreadth grounds because of its restrictions on anonymous speech with no mention of whether the government used the registration requirement of the statute before the court to harass those attempting to engage in speech) *with* Maj. Op. at 10 (arguing that the statute should be upheld for lack of anecdotes that suggest the "improper use of [§ 2257] records by government agents"). Indeed, the majority does not point to any decisions supporting the proposition that we should look to specific instances of governmental abuse of those who wish to speak anonymously with respect to the particular statute before the court or that we should rely on the government when it says, "Trust me." On the other hand, no one can argue that the Supreme Court's history of protecting sexually explicit speech is not as long or illustrious as its history of protecting speech critical of the government or other disfavored speech. *See McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 248 (2003) (Scalia, J., concurring in part and dissenting in part) (noting the Court's vigorous defense of virtual child pornography and sexually explicit cable programming while "smil[ing] with favor" upon a law that impinges upon "the right to criticize the government"); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 826 (2000) (writing that "[t]he history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly"–with reference to the sexually explicit speech at issue in the case). Our precedents are consistent: when it comes to injury-in-fact our case law has counseled against trusting in the benevolence of government not to apply a law where it can be applied according to its text by according standing so that those laws can be challenged. And when it comes to anonymous speech our case law has counseled against trusting in the benevolence of the government not to persecute those who engage in disfavored speech by striking down laws which threaten anonymous speech by requiring identification to the government.

In short, the chilling effect on private couples here has already been recognized in the Court's acknowledgment of criminal sanctions' chilling effect on speech and identification requirements' chilling effect on private speech and anonymous speech. The majority argues that this law ought not be invalidated in its entirety because enforcement against private couples may never happen. I would hope that would be so, but the statute by its language gives the government the ability to impose criminal sanctions on private couples for not creating and maintaining records. While the majority suggests that enforcement is a free-floating concern that militates against the substantiality of overbreadth, the majority does not point to any cases supporting its argument, casting doubt on the existence of such a case. The chilling effect analysis subsumes the enforcement concern into the more important issue as to whether private couples will be deterred from speaking, in consideration of not only whether the statute will be enforced, but more importantly, what the statute requires in the first instance of those who wish to speak, whether the statute by its language can be enforced, and if enforced, how severe the sanctions on protected speech are. The majority counsels us that plaintiffs should rely on the fact that prosecution of private couples under this statute "has never occurred" and further that the day "may never come to pass" in which it is enforced. Maj. Op. at 22, 24. But where private couples are likely to be chilled from engaging in the speech at issue, a prosecution may never occur for the very reason that private couples have ceased engaging in speech that the statute makes unlawful–a repugnant outcome to the First Amendment and the core reason for the existence of overbreadth challenges. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

Put differently, the chilling effect on private couples makes their claims ripe for adjudication. A law's chilling effect "justif[ies] a lessening of the usual prudential requirements for a pre-enforcement challenge to a statute with criminal penalties." *Nat'l*

Rifle Ass'n v. Magaw, 132 F.3d 272, 284-85 (6th Cir. 1997) (citing *Sec'y of State v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984)); *see also Warshak v. United States*, 532 F.3d 521, 533 (6th Cir. 2008) (en banc) (citing *Anderson v. Spear*, 356 F.3d 651, 669 (6th Cir. 2004))("a chilling effect might relax ripeness requirements in a First Amendment case"); *Currence v. City of Cincinnati*, 28 Fed. App'x 438, 441 (6th Cir. 2002) (citing *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1500 (10th Cir. 1995)) ("Ripeness analysis is relaxed for First Amendment cases involving a facial challenge to a regulation because courts see a need to prevent the chilling of expressive activity"). "The loss of First Amendment freedoms[,] . . . [which] unquestionably constitutes irreparable injury," counsels against the typical ripeness standard. *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1057-58 (9th Cir. 1995) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)) (internal quotation marks omitted). No doubt "[t]he courts have repeatedly shown solicitude for First Amendment claims" particularly "with regard to facial challenges to a statute or ordinance." *Peachlum v. City of York*, 333 F.3d 429, 435 (3d Cir. 2003) (citing *Broadrick*, 413 U.S. at 612). When asserting third-party claims in overbreadth challenges, the litigant has not been required to show that the third-party claims are ripe. *See United States v. Williams*, ___ U.S. ___, 128 S. Ct. 1830, 1842-43 (2008); *Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 536 U.S. at 167 n.14 (allowing the third-party claim of those who wish to canvass anonymously to factor into substantiality of overbreadth without any notion of whether claims had been or will be brought against them noting only that the statute would require them to surrender their anonymity); *see also The Supreme Court 2007*

Term–Leading Cases, 122 HARV. L. REV. 385, 393 n.80 (2008) (commenting that "[t]he Court routinely points to hypothetical unconstitutional applications without considering their likelihood" using *Free Speech Coalition* as an example where the statute at issue might subject "films such as *American Beauty*, *Traffic*, and *Romeo and Juliet*" to "severe punishment" even in spite of "the improbability [ ] the government [would] ever bring[ ] such prosecutions"). In *Williams*, the Court deemed "fanciful hypotheticals" those third-party claims–namely, a person offering non-pornographic photographs of young girls to a pedophile who expects that the pictures will contain child pornography, Hollywood movies that depict underage characters having sex, and persons who turn child pornography over to the police–that "[did] not implicate the statute," not those where enforcement had not been promised to those third-party claims falling under the statute.[4] 128 S. Ct. at 1843-44. The majority all but acknowledges that the law is unconstitutional as applied to private couples, Maj. Op. at 24, that the law applies to private couples by its text, Maj. Op. at 20-21, and that the law applies criminal penalties to those who violate the law, Maj. Op. at 4, but it decides, couched in the language of substantiality of overbreadth, not to invalidate the law on its face using concerns sounding in ripeness that suggest an exacting standard for ripeness of third-party claims. As noted before, the majority fails to cite to any cases to support this proposition, Maj. Op. at 22-24, which demonstrates a weakness to its argument in the face of our precedents which emphasize the gravity of the chilling of third parties where the statute criminalizes their protected speech by its text as does the statute here.

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[4] For a hypothetical that did fall under the statute, documentary footage of atrocities committed in foreign countries, the Court took it seriously and moved to how it affected the substantiality balance. *Williams*, 128 S. Ct. at 1844. Where "the statute might cover"–by its language–the hypothetical, the Court did not ask whether enforcement would be sought. *Id.*

Substantiality, then, considers the third-party claims of the private couples without any additional notion of enforcement where it has been subsumed in other analyses. At the same time, our cases have brought issues such as a statute's chilling effect and its burden on speech to the forefront. The majority states that the question of substantiality is: When "is it appropriate to invalidate a law in all of its applications when its invalidity can be shown (or assumed) in just some of its applications?" Maj. Op. at 24. That could very well be framed as: "When is it appropriate to adjudicate unconstitutional applications of a statute on a case-by-case basis versus invalidating a law in its entirety because of some unconstitutional applications?" The second formulation not only brings to life a central concern that runs throughout overbreadth–namely that unconstitutional applications otherwise may never make it before the court because speakers refrain from speaking, injuring speech and leaving few left to challenge the unconstitutional law–it also presents for consideration the burden–as it pertains to the substantiality of overbreadth–on a private couple in challenging the law as-applied. *See Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (acknowledging that overbreadth adjudication reduces the "social costs" of the "considerable burden (and sometimes risk) of vindicating [] rights through case-by-case litigation"). "[T]he opportunity to raise constitutional defenses at a criminal trial is inadequate to protect the underlying constitutional rights" in the face of possible criminal conviction because of the practical burden of "becoming enmeshed in protracted criminal litigation" and the corresponding waste of resources. *Perez v. Ledesma*, 401 U.S. 82, 118 (1971). Nor has the Court overlooked "the opprobrium and stigma" of criminal prosecution and conviction. *Am. Civil Liberties Union*, 521 U.S. at 872. Added to the burden on criminal defendants who would challenge the law in this case is the public scrutiny of a case dealing with private sexually explicit speech. *Cf.* Maj. Op. at 9. The social costs of case-by-case adjudication here are as great as in any prior Supreme Court decision.[5]

True, "that a criminal prohibition is involved does not obviate the need for the [substantiality] inquiry or *a priori* warrant a finding of substantial overbreadth." *New York v. Ferber*, 458 U.S. 747, 773 (1982). The majority argues that the application of § 2257 to private couples "has not been shown to involve a materially significant number of people." Maj. Op. at 24. The majority does not dwell on this argument, though, perhaps because our precedents have not required a showing by the litigant that a certain number of people are engaged in a particular activity; instead, we have analogized a third-party's claim to past cases in which we have or have not held a statute overbroad. *See Watchtower Bible & Tract Soc'y of N. Y.*, 536 U.S. at 166 (recognizing "a significant number of persons" in those who seek to canvass anonymously based on "our [prior] cases involving [the] distribution of unsigned handbills"). In other words, when the Supreme Court or our precedents have evaluated whether an "amount of protected speech" is "substantial," *Williams*, 128 S. Ct. at 1838, they have analogized to decided cases as to the interests at stake rather than demanding some statistics in accordance with the natural meaning of the word "amount." At one extreme, the Tenth Circuit has held that "a First Amendment challenge to the facial validity of a statute is a strictly legal question; it does not involve the application of the statute in a specific factual setting." *Kan. Judicial Review v. Stout*, 519 F.3d 1107, 1118 (10th Cir. 2008) (citing *ACORN v. City of Tulsa*, 835 F.2d 735, 740 (10th Cir. 1987)).

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[5] This action was initiated only because of the adverse economic effect on Connection's magazine triggered by the reduction it experienced in adult subscribers' exchange of legal adult pornography after the enactment of this statute.

Sexually explicit speech produced by consenting adults kept in the privacy of their own home is "ordinary and harmless speech" not unlike "conversations between neighbors." *Riel v. City of Bradford*, 485 F.3d 736, 754 (3d Cir. 2007) (citing *Watchtower Bible & Tract Soc'y of N.Y.*, 536 U.S. at 165-66); *see also United States v. U.S. Dist. Court*, 407 U.S. 297, 313 (1972) (citing *Katz v. United States*, 389 U.S. 347, 358 (1967)) (holding that in the Fourth Amendment context, "private speech," a "cherished privacy of law-abiding citizens" that the Bill of Rights was meant to safeguard, is shielded from "unreasonable surveillance"). "The uninhibited exchange of ideas and information among private parties" is an important interest protected by the First Amendment. *Bartnicki*, 532 U.S. at 532. In *Stanley v. Georgia*, 394 U.S. 557 (1969), the Court emphasized the distinction between the "regulation of commercial distribution of obscene material" and the "mere private possession of such material." 394 U.S. at 563-64. The

Court understood the First Amendment's protection of speech taking place in "the privacy of [one's] own home" with respect to other constitutional protections of the home by the Fourteenth Amendment, *id.* at 564 (citing *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965)), and the Fourth Amendment, *id.* (citing *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled by Katz*, 389 U.S. at 353 (1967)), in holding that the First Amendment protected private possession of obscene material in the home. *Id.* at 566. Regulation and criminalization of the private speech of private couples is similarly repugnant here.

Anonymous speech is also an interest of private couples. The Supreme Court has held that "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995). Many rationales for anonymity have been recognized by the Court, including the "fear of economic or official retaliation, ▯ concern about social ostracism, or merely ▯ a desire to preserve as much of one's privacy as possible," all concerns of which apply to private couples here with regard to the content of the speech at issue. *Id.* at 341-42. The interest in anonymity extends beyond handbills and political works to those producing literary works as well. *Id.* For instance, the author behind Shakespeare's work, *id.* at 341 n.4 (pointing out the possibility that Shakespeare was a pseudonym for the Earl of Oxford), has an interest in anonymity as someone depicting "teenage lovers" with the suggestion that they "consummated their relationship," *Free Speech Coal.*, 535 U.S. at 247. The majority draws an artificial distinction here based on whether "an historically significant mode of communication" is affected, Maj. Op. at 14, rather than looking to whether the group at issue has an interest in speaking anonymously according to a historically significant rationale for anonymous speech as the Court has done, *see Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 536 U.S. at 166-67; *McIntyre*, 514 U.S. at 341-43; *cf. Peterson v. Nat'l Telecomm. and Info. Admin.*, 478 F.3d 626, 632 (4th Cir. 2007) (dealing with a non-"historically significant mode of communication," Maj. Op. at 14, namely a website, but still considering whether the litigant has an interest in anonymous speech by looking to "the concerns underlying the right to anonymous speech," before concluding that he did not because he did not rely on anonymity in his speech). "[T]he First Amendment protects anonymity where it serves as a catalyst for speech." *Peterson*, 478 F.3d at 632. The private adult couples here maintain an interest in anonymity with regard to the intensely personal and private nature of consensual sexually explicit imagery, the disfavored status of sexually explicit imagery, and the potential for social ostracism and official retaliation that comes from identification in sexually explicit imagery.[6]

As the majority points out, commercial producers have no interest in anonymous sexually explicit speech. Maj. Op. at 10, 13 (citing *ALA II*, 33 F.3d at 91). The Second Circuit has recognized this distinction as well, which mirrors the majority's analogy between record-keeping for private couples and record-keeping with regard to commercial producers, namely that between those website visitors engaging in commercial activity on the internet who have "no clear expectation of or interest in remaining anonymous" such that their identification passes First Amendment scrutiny, *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 195 (2d Cir. 2007), whereas identification requirements to enter sexually explicit websites force any non-commercial visitor to "forgo the anonymity otherwise available on the internet," *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 99 (2d Cir. 2003), in violation of their interest in anonymity, *SPGGC, LLC*, 505 F.3d at 195. Our private couples here are not unlike the noncommercial website visitor. The latter surfs sexually explicit websites with an expectation of privacy generally available on the internet, *Am. Booksellers Found.*, 342 F.3d at 99, just as the former produces sexually explicit imagery with an expectation of privacy generally available in private communications. Where the majority points out that the rise of "internet-based chat rooms and the like explain" at least part of the decline of Connection's subscriber base, Maj. Op. at 10-11, the majority implicitly acknowledges that anonymity is important to private couples and swingers because the internet provides an anonymous alternative to speech covered by § 2257's record keeping requirements.

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[6] As above, *Watchtower Bible & Tract Society of New York* foreclosed the argument that revealing one's physical identity means that one has no interest in anonymity. 536 U.S. at 167. For instance, in the trial of Robert Kelly, the success of the Shaggy defense–the bald assertion that "it wasn't me"–suggests that the difficulties in precise physical identification allow for anonymity even when a depicted person appears in an 27-minute sex tape. *See* Josh Levin, *Dispatches From the R. Kelly Trial*, SLATE, May 21, 2008, http://www.slate.com/ id/2191876/entry/2191877/

In addition, some amount of sexually explicit imagery produced by private couples will overlap with other constitutionally protected speech, including obscenity kept in the privacy of one's home, *Stanley*, 394 U.S. at 564-68, and nonobscene sexually explicit imagery of consenting adults generally, *see Free Speech Coal.*, 535 U.S. at 250-51. Taking the above together with private speech and anonymous speech, the amount of protected speech impacted is extensive indeed.

Similarly, the majority uses pure reasoning to calculate the "amount" of speech falling within the statute's plainly legitimate sweep. *See* Maj. Op. at 19-20. In surmising that the amount of speech involving Connection and its subscribers is small, the majority reasons that swingers represent a minority of those in the pornography industry but does not make an attempt to quantify this number. *Id.* The evidence with regard to the amount of sexually explicit imagery consisting of young-looking models, which the majority argues falls within the statute's plainly legitimate sweep, is flawed as well. First, it is worth pointing out that their evidence deals only with commercial sexually explicit imagery. Second, the majority concludes that the amount of sexually explicit imagery consisting of young-looking models is vast by combining the generally accepted notion that the commercial pornography industry is vast with the Attorney General's Commission on Pornography and a Senate Judiciary Committee hearing on § 2257 which both assert that most commercial pornography depicts young-looking persons. This is a lot of weight to put on evidence from the 1980s (1986 and 1988, respectively), particularly when the rise of distributed means of production, e.g., digital cameras and camcorders, explains why an overbreadth challenge presenting the rights of private couples to produce sexually explicit imagery has far more basis today than it did in the

1980s. Twenty years have passed since these reports, and meanwhile digital video and still cameras have become ubiquitous, where before the capacity to capture sexually explicit images may have resided in the hands of far fewer people. This means equally a rise in production of non-commercial sexually explicit imagery and commercial pornography involving a broader range of interests.[7] A few comments from 20 years ago have little relevance today, and thus, the Government has not met its burden here. *See Playboy Entm't Group, Inc.*, 529 U.S. at 816-17 ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.").

Regardless, commercial pornography does not fall within the statute's plainly legitimate sweep. The majority suggests that all commercial pornography falls within the statute's plainly legitimate sweep because commercial pornography is dominated by young-looking models which fall within the statute's plainly legitimate sweep. Maj. Op. at 19. However, the majority does not have much confidence in this suggestion, as it only can say that commercial pornography "is the setting in which it is easiest to accept the constitutionality of these proof-of-age requirements." Maj. Op. at 20. But *Broadrick* and our overbreadth case law instruct courts to look at the legitimate sweep of the statute which is "plain," 413

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[7] The record shows that in 2005, www.AdultFriendFinders.com, a site for swingers, had over 13 million personal ads, consisting of personally written text and personally produced sexually explicit images, with 96% to 98% of those ads placed by couples where both individuals were over the age of 21.

U.S. at 615, not that which is easiest to accept.[8] The majority all but concedes that the application of § 2257 is "problematic" with regard to sexually explicit images in which the actors and actresses are clearly middle-aged individuals. Maj. Op. at 20. That acknowledgment in itself shows that the legitimacy of § 2257 as applied to commercial pornography is not plain.[9]

Nor is the constitutionality of the statute as applied to young-looking models in commercial pornography plain. *Free Speech Coalition* held that virtual child pornography could not be regulated[10] for the purpose of regulating child pornography, simply because virtual child pornography depicted those who "appear[ed] to be" children. 535 U.S. at 254-55. Section 2257 requires records of young-looking models–otherwise known as those models who appear to be children–in an effort to regulate actual child pornography, an analogous situation to that in *Free Speech Coalition*. *See id.* No children are abused in the creation of commercial pornography with young-looking models. *Id.* at 236. The majority distinguishes our case from that in *Free Speech Coalition* by referring to the level of scrutiny applied–that is, intermediate scrutiny here versus strict scrutiny in *Free Speech Coalition*, Maj. Op. at 14–but that does not change the Court's concern with "[p]rotected speech . . . becom[ing] unprotected merely because it resembles" unprotected speech, *Free Speech Coal.*, 535 U.S. at 255. Rather, it only addresses whether that concern when combined with the level of scrutiny suffices to invalidate a law, or whether the concern simply militates in favor of invalidating it. Nevertheless, one need not agree that the law ought to be invalidated on the basis of *Free Speech Coalition*; it is enough to agree that the reasoning of *Free Speech Coalition* calls into question whether the application of § 2257 to young-looking models in commercial sexually explicit imagery is plainly legitimate.[11]

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[8] The opinion of Connection's counsel as to the constitutionality of the statute as applied to young-looking models in commercial sexually explicit imagery is irrelevant to whether said application is actually plainly legitimate according to Supreme Court precedent. *Cf.* Maj. Op. at 19-20.

[9] The district court judge in *ALA II* held § 2257 unconstitutional, and on appeal, one judge dissented from the majority's reversal. *ALA II*, 33 F.3d at 94-95.

[10] The Court in *Free Speech Coalition* expressly rejected the argument that the statute at issue did not suppress or criminalize speech because it gave the defendant an affirmative defense "to avoid conviction for nonpossession offenses by showing that the materials were produced using only adults and were not otherwise distributed in a manner conveying the impression that they depicted real children." 535 U.S. at 255. Indeed, this covers much (if not all) of the protected speech the majority used to weigh in favor of calling the statute substantially overbroad. The argument that the protected speech here is not criminalized or suppressed by § 2257 then is unavailing because the Court in *Free Speech Coalition* makes clear that we must look at the burdens put on speech–as there, raising an affirmative defense during a criminal felony prosecution. Private couples here must compile records, affix statements to the images, and then subsequently

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maintain such records for at least five years with law enforcement being able to enter the home at least once every four months to inspect the records; or in the alternative, private couples must face punishment under § 2257 which includes imprisonment for up to five years and fines.

[11] Couple this with the developing nature of the Supreme Court's First Amendment jurisprudence generally and we must decline to opine that the regulation of young-looking models in

To decide the constitutionality of § 2257 as applied to young-looking models in commercial sexually explicit imagery where the Supreme Court has not ruled is to "formulate a rule of constitutional law broader than is required by the precise facts," which the majority counsels against. Maj. Op. at 18 (quoting *Wash. State Grange v. Wash. State Republican Party*, __ U.S. __, 128 S. Ct. 1184, 1191 (2008)). The majority seems today to try to craft a law that applies to commercial sexually explicit imagery, Maj. Op. at 19-20, which at the same time does not apply to private couples, Maj. Op. at 24. In so doing, the majority attempts to both rule on overbreadth at the same time as it formulates a new constitutional rule with regard to the legality of a universal recordkeeping requirement in the commercial production of sexually explicit imagery. Perhaps the majority is attempting to decide constitutional and unconstitutional applications of the statute when it asserts that "[a] court may enjoin the unconstitutional *applications* of the law while preserving the other valid applications of the law," it need not invalidate a entire statute when it cannot "sever an offending portion of the *text* from the rest of the statute," Maj. Op. at 26. The authorities cited by the majority do support this proposition, but whether a law can be crafted prospectively in this way depends on "how easily we can articulate the remedy." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320,

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commercial sexually explicit imagery is plainly legitimate. *See also Williams*, 128 S. Ct. at 1841-42 (analyzing the plainly legitimate sweep of the statute by looking to established categorical exceptions to First Amendment protection, namely the lack of protection for "[o]ffers to engage in illegal transactions" and the well-documented distinction between "a proposal to engage in illegal activity and the abstract advocacy of illegality").

329 (2006). On the other hand, "making distinctions in a murky constitutional context . . . may call for a far more serious invasion of the legislative domain than we ought undertake." *Id.* at 329-330 (citing *United States v. Treasury Employees*, 513 U.S. 454, 479 n.26 (1995)) (internal quotation marks omitted). The Supreme Court has thus continued to emphasize refraining from prospectively setting out a law's constitutional and unconstitutional applications for claims, by the litigant representing himself or third parties, where it is not a "relatively simple matter." *Treasury Employees*, 513 U.S. at 479 n.26 (citing *United States v. Grace*, 461 U.S. 171, 180 (1983)). Therefore, the plainly legitimate sweep of the statute is in its coverage of child pornography. *See Osborne v. Ohio*, 495 U.S. 103, 109-15 (1990).

By the time I reach the issue of substantiality, most of the work has been completed. With my differing approach to the requirements for substantiality, my analysis will proceed much differently from the majority's. The protected speech impacted is that of private couples producing sexually explicit imagery. The plainly legitimate sweep of the statute is in its coverage of producers of child pornography. The chilling effect of the statute to private couples is severe in recognition of the statute's application by its text to private couples, the statute's criminal penalties, its invasion of privacy, and its identification requirements. The burden on case-by-case resolution to this problem is also severe because of the possibility of imprisonment and other criminal sanctions, the expense of resources in mounting a defense, and the social opprobrium in the association with recorded sexually explicit activity. As argued above, the chilling effect is such that case-by-case resolution may never come to pass because speakers refrain from speaking.

The overbreadth analysis in *Free Speech Coalition* is instructive because it deals with a statute whose plainly legitimate sweep amounted to child pornography and obscenity. 535 U.S. at 256. But the statute covered the depiction of sexually explicit activity between youths under the legal age which did not amount to obscenity and did not use actual children. *Id.* at 246-47. The Court in *Free Speech Coalition* held that the statute was substantially overbroad with emphasis on the fact that enforcement of the statute against non-obscene sexually explicit imagery depicting sexually explicit activity between youths, even though the depicted persons were either adults or simulated, took the statute far astray from its purpose in preventing the abuse of children, 535 U.S. at 245, to the point where it intruded on speech we take for granted such as Hollywood movies and Shakespeare, even in spite of the unlikelihood of prosecution in those circumstances, *id.* at 247-48. The majority here similarly acknowledges that the application of § 2257 to private couples "is far removed from the underlying purposes of the Act," Maj. Op. at 23, suggesting the substantiality of overbreadth. In other words, the "[p]rotected speech does not become unprotected merely because it resembles the latter" when the underlying purpose of the statute is not being served; "[t]he Constitution requires the reverse." *Free Speech Coal.*, 535 U.S. at 255. The statute at issue in *Watchtower Bible and Tract Society of New York* covered both those going door-to-door to carry out commercial transactions or solicit funds and those making the rounds for religious, political, or other advocacy purposes. 536 U.S. at 168. Because the government's rationale in enacting the statute was to prevent crime and fraud, "the ordinance significantly restricted a substantial quantity of speech unrelated to the [government's] interest in eliminating fraud and unwanted annoyance," and so the Court invalidated the law on its face for overbreadth. *Id.* at 160 (citing *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 240 F.3d 553, 572 (6th Cir. 2001) (Gilman, J., dissenting), *rev'd by* 536 U.S. 150 (2002)). Similarly, the over-inclusive reach of the statute here sweeps in all sexually explicit images, whether created for commercial purposes or non-commercial purposes, whether distributed widely or kept in the privacy of one's own home, or whether the individuals depicted are young-looking or clearly over the age of majority. The government seeks to prevent child pornography, an important if not paramount governmental interest, but cannot do so by burdening speech of such importance and sweep, far removed from the purposes of the statute. Indeed, overbreadth exists to cure statutory imprecision when the legislature has drafted a statute which by its text reaches expressive activity far afield from its valid exercise of its power. The majority argues that the Court in *Free Speech Coalition* applied the "most skeptical level of review" because the statute "did not hew closely enough to any of the government's asserted interests in enacting the law," both seemingly conflating overbreadth and as-applied analysis, at the same time as it ignores its own suggestion that the "most skeptical level of review" ought to apply to § 2257 as part of an overbreadth analysis for departing drastically from the government's asserted interests in enacting the law. *See* Maj. Op. at 14.

Otherwise, the Supreme Court has not provided much guidance on the factors that make up the substantiality inquiry. The majority clings to a statute that it admits is flawed, all but conceding that the statute is fatally flawed if applied, holding on to the representation that there will be no prosecutions in the feared circumstances. The uncontroverted illegality of the statute as a matter of law leads the majority to search out defects in the litigants' factual showings, namely those facts that exist out in the world, in an effort to defeat their proffered arguments, not the merits of their case. The Supreme Court has never done this. *Williams* is instructive, as there, the Court evaded the third-party arguments by construing the statute differently from the Eleventh Circuit so that the statute did not apply to the categories of speech that the Court of Appeals placed into the protected-speech-impacted category used to invalidate the statute on overbreadth grounds. 128 S. Ct. at 1842-44. Generally, the Court has reinterpreted laws to avoid application to protected speech so as to tilt the overbreadth balance against invalidation in those circumstances. *See also Hicks*, 539 U.S. 113 at 122 (interpreting "legitimate business or social purpose," contrary to the Virginia Supreme Court, to include leafleting and demonstrating, removing that protected speech from the overbreadth determination). But here, the majority agrees that the statute would apply to private couples by its text and that there is no way around this conclusion based on the statute Congress has drafted. Moreover, the interests of private couples accords with those interests in speech the Supreme Court has historically recognized as substantial and worthy of protection under the First Amendment. The majority's only answer is that no enforcement has been promised, which is contrary to the very notion of the rule of law when the statute applies to private couples by its text. And particularly in the First Amendment context, "[w]here regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute . . . which prescribes the limits of permissible conduct and warns against transgression." *Thornhill v. Alabama*, 310 U.S. 88, 98 (1940) (citing *Schneider v. New Jersey*, 308 U.S. 147, 155 (1939)).

No court has looked to the likelihood of enforcement as the majority does in determining substantiality. Maj. Op. at 22-24. Indeed, the majority cites no cases for the proposition that the lack of past enforcement or the promise of no future enforcement militates against finding a statute overbroad. *Cf. id.* And unlike the hypotheticals in *Williams*, the statute indisputably applies to private couples by its text. An application of the statute under those circumstances is clearly unconstitutional. Moreover, it attaches severe criminal sanctions and requires identification for the protected speech, such that, together, there is a likelihood of chilling the protected speech. The costs of case-by-case adjudication of the unconstitutional applications of the statute are high in consideration of the possibility of a lengthy imprisonment (up to five years), lifelong status as a felon, and social opprobrium for association with producing sexually explicit imagery. Finally, to reach speech excluded from protection under the First Amendment, the statute inhibits protected speech, under circumstances far flung from the underlying purpose of the statute. For those reasons, I would hold the statute unconstitutionally overbroad.

In citing to *Faustin v. City & County of Denver*, 423 F.3d 1192 (10th Cir. 2005) and *West v. Derby*

United Sch. Dist. No. 260, 206 F.3d 1358 (10th Cir. 2000), Maj. Op. at 25, the majority misses the point in an illustrative way. *Faustin* and *West* both dealt with local (city and school) policies. *Faustin*, 423 F.3d at 1195; *West*, 206 F.3d at 1361. The court in *Faustin* was even dealing with an *unwritten* policy, 423 F.3d at 1195, so of course the court had to inquire as to enforcement merely to understand the boundaries of the unwritten policy. The court in *West* dealt with a school district's "Racial Harassment and Intimidation" policy. 206 F.3d at 1361. To understate the fact, neither has the force of law of a federal criminal statute. The relevance of that fact is embodied in the severity of punishment at issue–5 years imprisonment and fines versus no punitive aspect to the policy at all, *Faustin*, 423 F.3d at 1196-98, and suspension from school, *West*, 206 F.3d at 1361–and the importance of a law's text in understanding its scope–a federal statute can be enforced everywhere according to its text while a local policy does not develop its dimensions until it is enforced. In other words, to even understand what a school district's policy means, a court must look to how it was enforced in the past. The court in *West* did exactly that when it "consider[ed] [a] limiting construction which the school district ha[d] given the policy" by looking to whether the school had ever "disciplined a student for possessing in textbooks and other school materials with legitimate educational purposes depictions of the Confederate flag or other racially divisive symbols." 206 F.3d at 1368. The concept that ties all of the considerations together –once again, that the majority ignores–is that the force of law of a federal criminal statute means that a chilling effect exists where a statute by its text applies to a category of protected speech.

The majority's arguments regarding the "thin record" in this case, Maj. Op. at 21-22, are similarly unpersuasive because the majority never argues that substantiality does not involve legal analysis analogizing to other interests past courts have found to be substantial rather than some kind of quantitative analysis counting the number of people affected. This argument might be countered with the notion that the majority only requires a more developed record as part of the exercise of its judgment with respect to substantiality, and it does not go so far as to demand hard numbers. *See* Maj. Op. at 25. However, this statement merely obscures the fact that a heavy record as to speech has never been required in overbreadth challenges on behalf of third-parties. Put differently, the majority imposes a requirement of the plaintiffs here that has teeth in punting their claim but no bite in the subsequent legal analysis that we must perform. The Supreme Court has acknowledged that facial challenges "invite judgments on fact-poor records" which is why overbreadth is allowed in limited circumstances such as the free speech arena because of the potential *chilling effect* of the statute at hand. *Sabri v. United States*, 541 U.S. 600, 609 (2004).

Indeed, the majority writes as if the thin record as to those engaging in this kind of speech layers abstraction on top of the abstraction that comes with lack of enforcement. Maj. Op. at 22. On the contrary, the thin record and the lack of enforcement are merely two aspects of the same concept–a concept that is endemic to and in fact the touchstone of overbreadth challenges. That concept is the chilling effect. The consideration of the chilling effect in free speech cases allows for weakened third-party standing and ripeness requirements in overbreadth challenges that necessitate a more abstract debate. The majority never argues that third-party claims are not properly before us whether because Connection and the Does have no standing or because the third-party claims are not ripe. Nor does the majority explain why lack of enforcement would not disqualify a first-party claim by private couples while at the same time the majority will not consider the third-party claims of the private couples before it. The third-party claims of the private couples are before us. We not only are deciding Connection's claims, we are deciding the claims of private couples who are before us. The doctrines of standing and ripeness function as gate-keepers, blocking the kinds of claims that the majority says are before us today. In letting Connection and the Does through the gate, likely because the majority cannot rebut the lesser requirement for third-party standing and ripeness in overbreadth, we turn to the constitutionality of the statute because our decision binds subsequent courts and litigants as the majority decision stands for the proposition that § 2257 is not overbroad. If the majority had argued that Connection and the Does did not have third-party standing to make an overbreadth challenge on behalf of private couples, then the majority's holding would not serve as binding precedent to a subsequent litigant bringing a third-party overbreadth challenge who had a more-developed record. The difference is between deciding the case on justiciability grounds and substantive overbreadth grounds. The majority holds itself out as agnostic as to whether the statute is actually overbroad. Yet it decides the case on substantive grounds which declare that the statute is not overbroad. With this in mind, concern for the underdevelopment of the record falls away.

If lack of enforcement is insufficient per se to doom an overbreadth challenge as the majority acknowledges, Maj. Op. at 25, then the only conclusion that can be drawn is that the statute is overbroad because the majority lacks other considerations of any force. *Id.* The majority acknowledges the costs to case-by-case adjudication, Maj. Op. at 24-25, and rebuts that with discussion of possible "harmful effects" to invalidating a statute with some constitutional applications, *id.* Our cases have not required us to do any kind of statistical or economic analysis when it comes to either of these requirements. The majority, without attempting any comparisons to cases in which overbreadth has been found substantial or the costs of case-by-case adjudication have outweighed the costs of facial invalidation, appears to reject the value of the speech at issue. Our cases describe the overbreadth that counts as substantial, so that we need to compare our case to such prior cases to understand overbreadth in the case before us. As an example, in *Free Speech Coalition*, the Court invalidated a law which aided law enforcement in the prosecution of child pornography and surely that came at great cost because of the tremendous harms of child pornography and the difficulties in its prosecution. 535 U.S. at 254-55. Nevertheless, the costs of the suppression of lawful speech (in *Free Speech Coalition*, virtual child pornography, 535 U.S. at 254) and its chilling effect outweighed the considerable harm in a weakened ability for the government to prosecute child pornography. The majority opinion fails to square the balancing required of it with the prescribed balance of *Free Speech Coalition*.

As for the remedy, I agree with the majority that, after overbreadth has been identified, "[a] court may enjoin the unconstitutional applications of the law while preserving the other valid applications of the law," Maj. Op. at 26, but I disagree that the possibility to exercise that technique exists here. The cases make clear that "the touchstone for any decision about remedy is legislative intent." *Ayotte*, 546 U.S. at 330. The majority itself admits that the legislature amended § 2257 in 2006 to "cover[] commercial and non-commercial pornography." Maj. Op. at 20; *see also Connection Distributing Co. v. Keisler* (*Connection III*), 505 F.3d 545, 552-54, 565 (6th Cir. 2007). Moreover, the expressed point of the law is to deal with all sexually explicit images of children, Maj. Op. at 2, and that makes no distinction between child pornography sold, traded, or created and kept in the privacy of one's own home and other legal adult sexually explicit imagery produced and kept in the privacy of one's own home. Congress would intend § 2257 to proscribe all of the aforementioned forms of sexually explicit images of children but how it would do so while at the same time not reaching the private production of sexually explicit images of adults is unclear under the existing form of the law when, by its terms, it is meant to reach private, non-commercial sexually explicit images. The majority does not propose a principled way to enjoin unconstitutional applications of the law while staying faithful to the legislature's intent. I do not doubt that it may be possible. I merely understand that alleviating the First Amendment concerns of the statute while at the same time maintaining the statute's legitimate applications requires a freer hand and more creativity than we have as judges.

In addition, I would hold that the statute is unconstitutional as applied to Connection and its advertisers for the simple, uncontroverted fact that the vast majority of swingers, Connection subscribers, and Connection advertisers are over the age of 21 if not middle-aged, and at the same time, § 2257 requires universal age-verification and recordkeeping such that they must create at the time of production and maintain records for those of all ages. None of the majority's arguments about the subjectivity of determining the ages of young-looking adults or the submission of body parts in lieu of a full-body photo with a face-shot changes that. *Cf.* Maj. Op. at 11-13. It is up to the legislature to consider those factors in drawing a sufficiently narrowly-tailored statute. Possibilities have been suggested: e.g., a statute requiring full-body shots that can be cropped if the advertiser only desires to show a body part, *cf. id.*, and a statute requiring identification of those under the age of 26, *Connection III*, 505 F.3d at 571 (Moore, J., concurring).[12] The statute as it is drawn burdens substantially more protected speech–that is, the speech of the vast majority of swingers, Connection subscribers, and Connection advertisers who are over the age of 21, if not middle-aged–than is necessary to advance the legislature's compelling interest of eliminating child pornography. And accordingly, I would hold the statute unconstitutional as applied to Connection and its advertisers as well.

For the forgoing reasons, I would reverse the grant of summary judgment to the government.

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[12] I make no comment about the constitutionality of those proposals because those cases are not before us. Just how a statute that would meet constitutional muster should be drafted is not obvious.

DISSENT

KAREN NELSON MOORE, Circuit Judge, dissenting, joined by Judges MARTIN and COLE. I join in Judge Kennedy's dissenting opinion and agree that 18 U.S.C. § 2257 is facially overbroad because it burdens, through the threat of criminal sanctions, a substantial amount of protected speech, a primary example being images made and kept by adult couples in the privacy of their own homes. The majority all but admits, as it must, that § 2257 covers the production of these protected images, and I agree with Judge Kennedy that the government's purported lack of enforcement in this area does not alter the analysis. I write separately only to elaborate on the additional conclusion of Judge Kennedy's dissent that § 2257's universal age-verification and record-keeping requirements, which apply equally to old and young alike, are unconstitutional as applied to Connection and to John and Jane Doe.

Although § 2257[1] applies only to sexually explicit images, the majority contends that the law is content-neutral and should be evaluated pursuant to the intermediate-scrutiny standard. The majority asserts that a regulation of speech is content-neutral so long as the government was aiming at the "secondary effects" of the speech, Majority Op. at 7, and cites several cases dealing with "time, place, and manner regulations" that affect speech, *see, e.g., City of Los Angeles v.*

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[1] In the interest of brevity, I refer to the universal age-verification and record-keeping requirements enforced under § 2257 and its applicable regulations as "§ 2257."

Alameda Books, Inc., 535 U.S. 425 (2002); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). The zoning ordinances at issue in these cases, as well as the "secondary effects" at which they were aimed, are much different than the statutory scheme before us. In the controlling opinion in *Alameda Books*, Justice Kennedy emphasized the unique quality of such zoning restrictions, explaining that "[t]he zoning context provides a built-in legitimate rationale, which rebuts the usual presumption that content-based restrictions are unconstitutional." 535 U.S. at 449 (Kennedy, J., concurring in judgment). *Alameda Books* concerned a zoning ordinance prohibiting the establishment of more than one adult-entertainment business in the same building. The city enacted this regulation in response to evidence that concentrations of adult businesses were associated with higher rates of robbery, thefts, prostitution, and assaults in the surrounding neighborhood. The secondary effects at which the government aimed were thus quite distinct from the regulated speech itself. Here, the line between the direct effects and the secondary effects of the speech is much blurrier than in these zoning cases. Unlike these time, place, and manner restrictions, the evil at which § 2257 is aimed, child pornography, is a type of speech, albeit unprotected, that is a subset of the regulated speech, sexually explicit images. It is therefore impossible to separate the content-based aspect of the regulation from the justification, as the justification itself relates to an aspect of the speech: its sexually explicit nature. As explained in my concurrence in the panel opinion, § 2257 is precisely the type of content-based restriction of speech to which we must apply strict scrutiny. *See Connection Distrib. Co. v. Keisler*, 505 F.3d 545, 568 & n.1 (6th Cir. 2007)

(Moore, J., concurring).

Because I conclude, however, that § 2257 is unconstitutional as applied to Connection and the Does regardless of whether intermediate scrutiny or strict scrutiny applies, I will assume for purposes of this dissent that intermediate scrutiny is applicable. Under intermediate scrutiny, challenged regulations of speech can be upheld only if the government shows "that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication." *Ward*, 491 U.S. at 791. I agree that the government has a significant, indeed compelling, interest in preventing the sexual exploitation of minors in child pornography. I cannot agree, however, that § 2257 is narrowly tailored to this interest. In the context of intermediate scrutiny, "the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Ward*, 491 U.S. at 799 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985) (alteration in original)). Although, unlike under strict scrutiny, the regulation need not be the least restrictive means of promoting the substantial government interest, *id.* at 798-800, it may not "burden substantially more speech than is necessary to further the government's legitimate interests," *id.* at 799. In other words, if the government "regulate[s] expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals," the regulation is not narrowly tailored. *Id.*

Given the alarming breadth of the universal age-verification requirement at issue, I must conclude that

§ 2257 burdens substantially more speech than is necessary to further the government's interest in preventing the sexual exploitation of minors. According to the government, Congress's purpose in enacting § 2257 was to prevent the sexual exploitation of minors in child pornography. Elsewhere, Congress has chosen to advance these ends directly by passing a flat ban on the production of child pornography. *See* 18 U.S.C. § 2251. It also has chosen to advance these means indirectly by prohibiting the distribution, receipt, and possession of child pornography. *See* 18 U.S.C. § 2252; *see also New York v. Ferber*, 458 U.S. 747, 765 (1982) (upholding a similar state statute); *Osborne v. Ohio*, 495 U.S. 103, 111 (1990) (same). These indirect regulations advance the goal of preventing the sexual exploitation of children by destroying the market for materials depicting such activity. *See Osborne*, 495 U.S. at 109. In both the direct and indirect regulations, Congress has chosen to advance its interest in preventing the exploitation of minors by regulating materials depicting the exploitation of minors.

The regulation at issue in this case, § 2257, does not apply solely to child pornography. It applies to a class of materials much broader than those depicting what Congress ultimately seeks to prevent, and therefore does not seek to advance Congress's ultimate goal directly, or even as directly as § 2252's prohibitions on distribution, receipt, and possession of child pornography. Instead, Congress seeks to supplement these existing bans by imposing age-verification and record-keeping requirements on all visual depictions of actual sexually explicit activity, regardless of the age of the performers. In this regard, the means employed by § 2257 are distinguishable from, and significantly broader than, those employed by §§ 2251 and 2252.

According to the majority, § 2257 advances the interest of protecting minors from sexual exploitation in four ways. First, "[i]t ensures that primary producers of pornography confirm that performers are of age before filming them." Majority Op. at 9. Second, "it permits secondary producers . . . to ensure that the individuals depicted in their publications are of age." *Id.* Third, "it prevents children from attempting to pass themselves off as adults." *Id.* Finally, "it creates a compliance system in which law-enforcement officers not only can identify the performers depicted in magazines and movies and verify their ages but also can eliminate subjective disputes with producers over whether a model's *apparent* age should have triggered an age-verification check." *Id.* Thus, unlike the range of other statutes enacted to meet the same goal, § 2257 does not regulate child pornography directly. It is instead part of a larger regulatory scheme designed to stamp out the production of, and demand for, materials depicting the sexual exploitation of minors. In other words, to aid enforcement of a ban on unprotected speech, § 2257 regulates a broad category of protected speech, the vast majority of which receives First Amendment protection. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994) ("[N]onobscene, sexually explicit materials involving persons over the age of 17 are protected by the First Amendment.").

The key question is whether the means employed in § 2257—imposing age-verification and record-keeping requirements on all who produce depictions of actual sexually explicit conduct, regardless of the performers' ages—burdens substantially more speech than necessary to prevent the sexual exploitation of minors in child pornography. The majority believes that the universal age-verification and record-keeping requirements do not impose a burden on adults who wish to advertise in one of Connection's magazines. According to the majority, because advertisers must give their records only to Connection and not to the general public, and because these advertisers are already submitting revealing photographs with their names and addresses, no "individuals would shy away from producing verification of their ages as well." Majority Op. at 10. This ignores the individual defendants before us, the Does, whose speech has been chilled by their fear that the government will view their images as obscene and will prosecute them for obscenity. Given the vagueness historically associated with defining obscenity, this fear cannot be said to be irrational. *See, e.g.*, *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I know it when I see it . . . ."). Further, the majority vastly understates the difference between providing perfunctory contact information to a magazine to which one submits anonymous photos and providing government-issued photo identification which must be kept on file for government inspection and through which one can be identified by the government as a performer in sexually explicit images. As Judge Kennedy notes, the Court has previously recognized that individuals have an interest in anonymous speech. *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 166-67 (2002). Even the fact that many of the photographs may reveal the performers' "physical identities [does] not foreclose our consideration of the [performers'] interest in maintaining their anonymity." *Id.* at 167.

The majority argues that identifying oneself to the public, as in *Watchtower*, is different than identifying oneself to Connection and the government. Majority Op. at 9-10. Although, as the majority notes, advertisers must provide Connection with a name and address, providing this contact information, which may be merely a post-office box, is different than providing government-issued photo identification, which may contain such information as one's driver's license number, physical address, and, of course, date of birth. Further, the statute requires that Connection keep these records, including a copy of the identification document, on file for inspection by the government "at all reasonable times." § 2257(c). *Watchtower* makes clear that speakers have an interest in anonymity with respect to the government as well as the public at large, as "[t]he decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." 536 U.S. at 166. To minimize this interest is to minimize the prohibitive effect § 2257 may have on adults who wish to advertise in Connection's magazines. But, the majority argues, the ultimate goal of these advertisers is to make "connections" with other swingers, in which case they will have to "lift the veil of anonymity." Majority Op. at 10. Again, *Watchtower* recognizes that revealing one's physical appearance to members of the public is a protected interest and is very different from providing identification to the government. 536 U.S. at 166-67. To be sure, Connection generally does not publish an individual advertiser's contact information, but instead prints an identification code so that an interested reader can contact Connection, which will then forward the reader's contact information to the advertiser, who can then choose whether to contact the reader. In any case, the advertiser chooses how much information to include in his or her advertisement. In this way, Connection's process is designed to maintain the confidentiality of its advertisers. Even "facilitating a liaison," Majority Op. at 10, would not require an advertiser to reveal his or her true identity to the person with whom the advertiser meets, much less give the advertiser's full name, physical address, date of birth, and driver's license number. Revealing one's sexual tendencies to the government is very different from revealing these tendencies to someone who has been chosen and pre-screened and is known to share these same tendencies. The majority's attempts to minimize § 2257's burden on protected speech thus fail.

Imposing this burden on Connection and its potential advertisers does not advance Congress's goal of ending child pornography. The evidence in the record indicates that the vast majority of swingers are middle-aged and accordingly not at risk of being mistaken for minors, and the record contains no indication of swingers engaging in sexual exploitation of minors. Accordingly, in the vast majority of instances, applying § 2257's age-verification and record-keeping requirements to this population does not advance the government's interest in preventing child pornography, but instead operates to burden constitutionally protected speech without any corresponding benefit. Indeed, this is true of all visual depictions of actual sexually explicit activity involving performers who are clearly above the age of majority. Because a substantial portion of the burden on speech does not serve to advance the government's asserted goal, § 2257 is not narrowly tailored to the government's interest in preventing the sexual exploitation of minors in child pornography.

The Supreme Court's opinion in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), bolsters this conclusion. There, the Court struck down a statute "extend[ing] the federal prohibition against child pornography to sexually explicit images that appear to depict minors but were produced without using any real children." *Id.* at 239. Although the Court there struck down the law on its face for overbreadth, the Court's reasoning is instructive. Key to the Court's conclusion was the fact that the speech at issue "record[ed] no crime and create[d] no victims by its production" and consequently was protected speech. *Id.* at 250. The government nonetheless sought to justify its ban on this protected speech as a means to ban unprotected speech. The Supreme Court noted that such an "analysis turns the First Amendment upside down." *Id.* at 255. I agree. In the majority of instances, § 2257, like the statute at issue in *Free Speech Coalition*, burdens speech that is neither criminal nor unprotected, as a means of banning unprotected speech (namely, child pornography). I conclude that such a regulatory regime is not narrowly drawn, and accordingly I would hold that § 2257's universal age-verification requirement is not narrowly tailored to the goal of curbing child pornography.[2]

To illustrate this point, Connection proposes a more-narrowly tailored regulation, modeling its proposal on the regime governing tobacco sales.

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[2] *Free Speech Coalition*, of course, is distinguishable in that it banned certain protected speech, while § 2257 merely burdens the speech. This distinction, however, is not dispositive. As noted above, the evidence in this case demonstrates that § 2257 places a substantial chill on certain types of expressive conduct and thus has an effect very similar to that of a flat ban.

According to Connection, store clerks are required to ask for identification whenever someone who appears under the age of twenty-six attempts to purchase tobacco products, even though it is legal to purchase such products upon turning eighteen. This regulatory scheme is designed to ensure that people who fall into the age range where they may or may not look old enough to buy tobacco are identified, while people who are clearly of-age are not inconvenienced. As the majority notes, Majority Op. at 11, the availability of a more tailored regulation does not, by itself, demonstrate that the regulation at issue fails the narrow-tailoring test, as intermediate scrutiny does not require that the regulation be the least restrictive means of achieving the government's interest. The point here is that alternatives exist that will burden substantially less protected speech, yet advance the government's asserted interest equally well, which is precisely why § 2257 is not narrowly tailored.

This is not to suggest that Congress must employ an analogous regulatory scheme, but rather to illustrate that it is possible to pursue an interest in identifying minors without burdening those who clearly are not minors. Additionally, a regulation similar to Connection's proposal appears to tack more closely to Congress's actual goal in passing § 2257. As the D.C. Circuit noted, "The 1988 Act was passed by Congress on the recommendation of the Attorney General's Commission on Pornography." *Am. Library Ass'n v. Reno*, 33 F.3d 78, 81 (D.C. Cir. 1994). More specifically, the Commission's Recommendation 37 suggested that Congress "enact a statute requiring the producers, retailers or distributors of sexually explicit visual depictions to maintain records containing consent forms and proof of performers' ages." *Final*

Report of the Attorney General's Commission on Pornography 138 (1986). The Commission recommended such legislation to deal with "pseudo child pornography," which "involve[s] women allegedly over the age of eighteen who are presented in such a way as to make them appear to be children or youths." *Id.* at 138 n.459 (internal quotation marks and citation omitted). According to the Commission, pseudo child pornography created special concerns because it was difficult and sometimes impossible for law-enforcement officials to discern whether the performers were above the age of eighteen or actually were minors. The Commission recommended imposing age-verification and record keeping requirements as a means to ensure that no minors were being exploited in actual child pornography that was passed off as pseudo child pornography. *Id.* at 140. A regulation modeled along the lines that Connection suggests would achieve this goal. Consequently, it is difficult to see why a universal age-verification requirement is beneficial. Because the goal of curbing child pornography would not "be achieved less effectively absent the regulation" of performers who are clearly adults, § 2257 is not narrowly tailored. *Ward*, 491 U.S. at 799 (quoting *Albertini*, 472 U.S. at 689).

The majority counters that such a regime would not eliminate the need for subjective determinations of age, which the majority argues would be made by producers untrained in age-verification. Majority Op. at 11-12. The majority does not explain, however, how Congress's goals are advanced by total elimination of subjective determinations of age for middle-aged performers, when Congress actually is concerned with subjective determinations of age for only young-looking performers. How is this goal helped by a regime under which fifty-year-old individuals are required to submit photo identification before publishing a sexually explicit image of themselves? As the majority points out, subjective age determinations may be harder to make when the photo does not include the performer's face, as in some of the advertisements in Connection's magazines. *Id.* at 11-12. If this is the case, Congress could simply require photo identification when the performer's face is not included in the image. The majority also is concerned that such a rule would leave the initial age determination up to the publishers themselves, who may not be trained in age determination. *Id.* at 12. But it is these publishers who will be punished if their determinations are incorrect, so that the ultimate enforcer will be the government. Regardless, these arguments are not aimed at the ultimate constitutionality of a universal age-verification requirement. Instead, they are arguments better addressed to a legislature attempting to draft a statute that would survive constitutional muster. It is not our place judicially to revise § 2257 or to tell Congress how to do so. Instead, I merely reiterate that § 2257 burdens substantially more protected speech than is necessary to advance Congress's compelling interest in preventing the sexual exploitation of minors. Accordingly, § 2257 is not narrowly tailored and is, therefore, unconstitutional as applied to Connection and the Does.

Protection of children is a government interest of the highest order. Nonetheless, under the applicable precedent, the means that Congress chooses to advance this end must not burden substantially more speech than necessary. For the reasons stated in this opinion, § 2257 is unconstitutional as applied to Connection and the Does. Moreover, I agree with Judge Kennedy's dissent that § 2257 is facially unconstitutional for overbreadth.

DISSENT

CLAY, Circuit Judge, dissenting. I join in Judge Kennedy's dissenting opinion which argues that 18 U.S.C. § 2257 is facially overbroad and unduly threatens constitutionally protected speech. I write separately only to indicate why I believe that some of the reasoning employed by this Court in its 1998 opinion pertaining to this case, which addressed an as-applied challenge to the statute, is no longer controlling.

In 1998, I authored the opinion for this Court in *Connection Distrib. Co. v. Reno*, 154 F.3d 281 (6th Cir. 1998) ("*Connection I*"). At that time, we addressed the likely merits of Connection's as-applied challenge, and were not presented with a facial challenge to the statute. We affirmed the district court's decision to deny Connection a preliminary injunction because we believed that Connection was unlikely to succeed on the merits of its as-applied challenge. My present position in rejecting the amended statute as facially unconstitutional may appear at odds with the views expressed in *Connection I*, where I found the statute constitutional, as applied. However, based on the record that has developed since *Connection I* as well as an amendment to the statute since enacted, Connection's as-applied challenge now has greater merit than it once did.

The statutory scheme at issue requires individuals depicted in "actual sexually explicit" images, such as Connection's advertisers, to provide government-issued photo identification verifying their age to producers such as Connection. 18 U.S.C. § 2257(b)(1); 28 C.F.R. § 75.2(a)(1). The producer must photocopy the identification, record any aliases the person has used in the past, record where the image is published if it is published on the Internet, and file this information in separately maintained records. 18 U.S.C. § 2257(b); 28 C.F.R. § 75.2(a), (e). These records are then subject to inspection by the attorney general every four months, or more frequently if there is "a reasonable suspicion to believe that a violation . . . has occurred[.]" 18 U.S.C. § 2257(c); 28 C.F.R. § 75.5(d). In 2003, Congress amended the statute to allow the government to use evidence obtained from the records to prosecute crimes other than record-keeping violations, including child pornography, sexual exploitation of children, and obscenity. 18 U.S.C. § 2257(d)(2); *see* Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act, Pub. L. No. 108-21, § 511(a), 117 Stat. 650, 684 (2003). Congress also increased the penalties for violations of the record-keeping provisions, which may now be charged as felonies punishable up to five years in prison, or up to ten years for a second offense. § 2257(i); 117 Stat. at 685.

In *Connection I*, we determined that the statute's record-keeping requirement is content-neutral because "the Act is not directed at protected speech but rather unprotected conduct–namely, child pornography–that may be identified by speech." 154 F.3d at 291. Intermediate scrutiny applies to such content-neutral regulations that impose an incidental burden on speech. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994). To survive intermediate scrutiny, the regulation must be "narrowly tailored to serve a significant governmental interest," and must "leave open ample alternatives for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The government bears the burden of proving that its regulation meets this standard. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000).

In *Connection I*, we denied a preliminary injunction based on Connection's as-applied challenge to the statute because we found that "the [record-keeping] provisions of [§ 2257] do not prohibit the sexually explicit speech at issue or unduly burden the opportunity of Connection and its readers to engage in the expression." 154 F.3d at 292. We also found that Connection did not demonstrate that the age reporting requirement chilled constitutionally protected expression because Connection's proof was based largely on "anecdotal evidence and supposition." *Id.* at 292-93. Connection argued that the greatest likelihood of a chilling effect would come from the fear on the part of Connection's advertisers that their identifying information would be unlawfully leaked to the public; we believed such a fear to be unfounded and unduly speculative. *See id.* at 294. We did not believe Connection had made a showing that the statute would compel advertisers to stop advertising simply because they would have to submit photo identification to the magazine along with their advertisements. Accordingly, we believed that "ample alternative channels" to advertise remained open. *Id.* at 293-94.

Connection no longer suffers from the same lack of evidence. The record now before this Court includes data showing that between 1991 and 2004, Connection's annual revenue from advertisements fell from $44,634.74 to $8,000.21, while magazine sales revenue fell from $975,872.98 to $385,874.21 during the same period. These numbers support the claims of the two newly added Plaintiffs who assert that they would have advertised in a Connection magazine but for the reporting requirement and the fear of being "outed" as a swinger or being subjected to a government investigation.

More importantly, the statute itself no longer begins and ends with the record-keeping requirement; because of the 2003 amendment, it now includes the threat of criminal prosecution for child pornography, sexual exploitation of children, and obscenity, based on information in the records required by the statute. *See* § 2257(d)(2). The amendment increases the likelihood that a reasonable person would be deterred from the protected activity at issue in this case, and calls into doubt this Court's finding in *Connection I* that the statute's provisions do not "unduly burden the opportunity of Connection and its readers to engage in the expression." 154 F.3d at 292.

Because the statute now explicitly authorizes the government to use the identifying information for the purpose of prosecuting other crimes, the fear of Connection's law-abiding advertisers that they may one day be subject to criminal investigation or prosecution is not unreasonable. To minimize this concern by stating that adult swingers who follow the law have nothing to fear ignores the reality that law-abiding people unfortunately can mistakenly become the targets of criminal prosecutions, with all of the accompanying burdens. The majority opinion therefore misses the point when it concludes that swingers who have already been willing to provide their names and addresses to Connection should not be reluctant to do so simply because a photo identification is now required as well; the issue is not the added piece of information swingers must provide, but the additional use to which that information may be put that the statute now sanctions. Further, it is not necessarily inconsistent to value anonymity in one form and not another. *See Watchtower Bible & Tract Soc'y of N. Y., Inc., v. Vill. of Stratton*, 536 U.S. 150, 167 (2002) ("The fact that circulators revealed their physical identities did not foreclose our consideration of the circulators' interest in maintaining their anonymity.").

We stated in *Connection I* that "courts must weigh the interests at stake in determining whether a statute impermissibly burdens free speech." 154 F.3d at 292. This kind of analysis is not static in an as-applied case; although the government will always have a significant interest in eradicating and prosecuting cases of child pornography, the nature of the burden imposed by a particular statute may become more evident over time. This is especially true when a court first addresses the issue in the context of a motion for preliminary injunction, where the record has not been fully developed and the court only considers the *likelihood* of future success on the merits. *See Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 653 (6th Cir. 1996). Moreover, the fact that the government's interest here is clearly compelling does not obviate this Court's need to continue balancing that interest with the burdens the regulation imposes. *See Watchtower*, 536 U.S. at 167 (requiring balance of interests even while recognizing importance of challenged regulation's aim of crime prevention). Connection's newly presented evidence and the increased possibility of criminal penalties together indicate that for Connection and its advertisers, the statute imposes a very real burden on their protected speech–a burden considerably greater than the record indicated in 1998.

Therefore, while the facial invalidity of the statute may render a final analysis of the as-applied question unnecessary, I have written separately to underscore my reasons for believing that the statute may also fail to survive an as-applied challenge to its constitutionality, notwithstanding this Court's prior ruling in *Connection I*.

DISSENT

HELENE N. WHITE, Circuit Judge, dissenting. I join in my dissenting colleagues' discussions of the as-applied challenge, and conclude, as do they, that under intermediate scrutiny the identification/record-keeping requirements of § 2257 impose an unconstitutional burden on plaintiffs' First Amendment rights.

I share the majority's reluctance to invalidate § 2257 in its entirety based on the hypothetical couple who create sexually-explicit depictions in private for their own use, as well as its preference for a resolution that permits § 2257 to operate within its constitutionally permissible reach. I have considered the alternative of simply agreeing that the statute is unconstitutional as applied and finding it unnecessary to address the facial challenge. But, notwithstanding my reluctance to reach the facial challenge, I agree with Judge Kennedy that § 2257's sweep is so broad – even when the substantiality of its overbreadth is assessed relative to its plainly legitimate sweep – and its burdens so potentially chilling of protected speech, that requiring case-by-case challenges to its overbreadth is inconsistent with the Supreme Court's First Amendment jurisprudence.

I do not agree with the majority that "[t]he record and the plaintiffs' concessions establish that the overwhelming majority of applications of § 2257 do not offend the free-speech guarantees of the Constitution." Maj. Op. at 23. Nor do I agree that plaintiffs' challenge amounts to "leveraging a few alleged unconstitutional applications of the statute into a ruling invalidating the law in all of its applications." *Id.* No doubt these differences stem at least in part from our divergent conclusions regarding the merits of plaintiffs' as-applied challenge.

My joining in Judge Kennedy's conclusion that the facial challenge should be upheld is based not only upon the application of § 2257 to the private couple, but also upon its application to plaintiffs and those like them, and to all adults who desire in any fashion to create, share, or disseminate non-obscene, sexually-explicit depictions of themselves, or other adults, without relinquishing their anonymity. While the majority correctly observes that we have no proof regarding the number of individuals who would be adversely affected by the application of § 2257, we do know that millions of adults exchange or share personally-produced sexually-explicit depictions. *See* J.A. at 1007-11 (stipulation of the parties noting the existence of, and incorporating an exhibit listing, over 13 million personal ads containing sexually-explicit text and images on a single website for sex and swinger personal ads, of which those examined showed that over 94% involved adults over 21).

While *Williams* and other cases cited by the majority do, indeed, as the majority stresses, require that a statute's "overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep," the majority cites no case where the application of this admonition resulted in the Court's rejecting a facial challenge under circumstances such as those involved here. *United States v. Williams*, __ U.S. __, 128 S. Ct. 1830, 1838 (2008). In *Williams*, the Court repeatedly rejected the defendant's proffered unconstitutional applications as either not within the reach of the statute or not involving protected speech. *Id.* at 1842-44. Only the *amici's* hypothetical movie distributor advertising a movie as containing footage of actual children engaging in actual or simulated sex, and the hypothetical documentary showing footage of child rape, arguably fell within both the statute's sweep and the protections of the First Amendment. *Id.* at 1843-44. The Court viewed the movie-distributor hypothetical as "implausible" and the documentary hypothetical as adequately protected by an as-applied challenge. *Id.* The Court's observation that "[i]n the vast majority of its applications, this statute raises no constitutional problems whatever," *id.* at 1844, was not made in the context of millions of adults engaging in speech falling both within the statute's sweep and the First Amendment's protection. Such is the case here.

In *Hicks*, the Court found the substantiality requirement unsatisfied where the challenged regulation applied not just to those seeking to exercise First Amendment rights but also to strollers, loiterers, drug-dealers, roller skaters, and others not engaged in constitutionally-protected conduct. *Virginia v. Hicks*, 539 U.S. 113, 123 (2003). The court observed that "[r]arely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech." *Id.* at 124. Here, the statute is addressed to conduct that is necessarily associated with speech; all the depictions that are the subject of § 2257 are speech, although those involving minors and those that are obscene are not protected by the First Amendment.

The instant case is, in this respect as in others, similar to *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002). In *Watchtower*, because the regulation affected a substantial amount of political and religious speech in addition to the targeted commercial speech, the Court found it necessary to look to whether the regulation struck an appropriate balance between the affected speech and the government's interest in the prevention of fraud, the prevention of crime, and the protection of residents' privacy. *Id.* at 164-69. In evaluating this balance, the Court did not require statistics comparing the number of commercial canvassers affected to the number of non-commercial canvassers, or empirical data regarding the extent to which the regulation would deter protected speech. *See id.* at 168. The Court was satisfied that the overbreadth was substantial based upon the inclusion of "'Camp Fire Girls,' 'Jehovah's Witnesses,' 'Political Candidates,' 'Trick or Treaters during Halloween Season,' and 'Persons Affiliated with Stratton Church,'" in the list of canvassers to which the ordinance applied. *Id.* at 165. I would similarly conclude that whatever the ratio of sexually-explicit depictions involving persons who appear to be or are minors is to all sexually-explicit depictions, a substantial amount of sexually-explicit depictions involve persons who appear to be and are adults, and a substantial number of adults, like the Doe plaintiffs, will be deterred from sharing sexually-explicit pictures by the identification/record keeping requirements of § 2257.

Broadrick does, indeed, give me pause, particularly the Court's admonition that application of the overbreadth doctrine is "strong medicine," and its statement that "[a]lthough such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect – at best a prediction – cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe." *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 615 (1973). However, in *Broadrick,* the statute's proscriptions were clearly stated and included "a substantial spectrum of conduct that is as manifestly subject to state regulation as the public peace or criminal trespass." *Id.* at 616. After observing that the statute was constitutional as applied to appellants' conduct, and a long list of other conduct, the Court rejected the argument that because the statute had been interpreted as applying to "such allegedly protected activities as the wearing of political buttons or the use of bumper stickers," *id.* at 618, it should be struck down as unconstitutionally overbroad. The Court explained "as presently construed, we do not believe that § 818 must be discarded *in toto* because some persons' arguably protected conduct may or may not be caught or chilled by the statute." *Id.* Here, the argument in favor of overbreadth does not rest upon "arguably protected conduct that may or not be caught or chilled." It rests upon clearly protected conduct that, given its nature and the intrusiveness of the identification/record keeping requirement, is likely to be chilled.

As to the remedy, it appears all agree that the statute does not provide guidance as to how Congress would limit its reach. Maj. Op. at 20-21, 26; Dis. Op. at 52-53 (Kennedy, J.). Thus, it is not susceptible to a limiting construction without entering into Congress' policy-making domain. The possibility of enjoining the unconstitutional applications of the law while preserving the other valid applications of the law is identified as a theoretical option by the majority, but is not the path chosen by it. Maj. Op. at 26. It seems, then, that all agree that this too is not a viable option. Dis. Op. at 52-53. The majority opts to "assume for the sake of argument that certain applications of the law would be unconstitutional but still reject a facial challenge." Maj. Op. at 26. The cases cited in support of this path are substantial overbreadth cases. *Hicks, supra*, 539 U.S. 113; *N.Y. Club Ass'n v. City of N.Y.*, 489 U.S. 1, 14 (1988) ("[W]e cannot conclude that the Law threatens to undermine the associational or expressive purposes of any club, let alone a substantial number of them."); *N.Y. v. Ferber*, 458 U.S. 747, 773 (1982) ("[W]e seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach."); *Broadrick, supra*, 413 U.S. 601. For the reasons stated, these cases do not support the majority's path.

Lastly, I do not regard the majority opinion as foreclosing the litigation posited by Judge Kennedy.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 06-3822

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CONNECTION DISTRIBUTING
CO.; RONDEE KAMINS; JANE
DOE; JOHN DOE,
Plaintiffs-Appellants,

v.

ERIC H. HOLDER, JR.,
Attorney General,
Defendant-Appellee.

Before: BOGGS, Chief Judge; KENNEDY, MARTIN, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, ROGERS, SUTTON, COOK, McKEAGUE, GRIFFIN, KETHLEDGE, and WHITE, Circuit Judges.

JUDGMENT

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.

UPON CONSIDERATION of the petition for rehearing en banc, the supplemental briefs, and argument of counsel, IT IS ORDERED that the judgment of the district court granting summary judgment to the government is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green
Clerk

No. 06-3822

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
APRIL 10 2008
LEONARD GREEN, CLERK

CONNECTION DISTRIBUTING CO., ET AL.	)	
Plaintiffs-Appellants,	)	
v.	)	ORDER
MICHAEL B. MUKASEY, ATTORNEY GENERAL,	)	
Defendant-Appellee.	)	

BEFORE: BOGGS, Chief Judge; MARTIN, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, ROGERS, SUTTON, COOK, McKEAGUE, and GRIFFIN, Circuit Judges.

A majority of the Judges of this Court in regular active service have voted for rehearing of this case en banc. Sixth Circuit Rule 35(a) provides as follows:

> "The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this court, to stay the mandate and to restore the case on the docket

sheet as a pending appeal."

According, it is **ORDERED**, that the previous decision and judgment of this court is vacated, the mandate is stayed and this case is restored to the docket as a pending appeal.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 07a0430p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CONNECTION DISTRIBUTING CO.; RONDEE KAMINS; JANE DOE; JOHN DOE,

Plaintiffs-Appellants,

v.

PETER D. KEISLER,[*] Acting Attorney General of the United States,

Defendant-Appellee.

No. 06-3822

Appeal from the United States District Court for the Northern District of Ohio at Cleveland.
No. 95-01993—John M. Manos, District Judge.

Argued: April 26, 2007

Decided and Filed: October 23, 2007

Before: KENNEDY, MOORE, and McKEAGUE, Circuit Judges.

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[*] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Acting Attorney General Peter D. Keisler is automatically substituted for former Attorney General Alberto R. Gonzales.

COUNSEL

ARGUED: J. Michael Murray, BERKMAN, GORDON, MURRAY & DEVAN, Cleveland, Ohio, for Appellants. Anne Murphy, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** J. Michael Murray, Lorraine R. Baumgardner, BERKMAN, GORDON, MURRAY & DEVAN, Cleveland, Ohio, for Appellant. Anne Murphy, Thomas M. Bondy, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

KENNEDY, J., delivered the opinion of the court. MOORE, J. (pp. 18-22), delivered a separate concurring opinion. McKEAGUE, J. (pp. 23-27), delivered a separate opinion concurring in part and dissenting in part.

OPINION

KENNEDY, Circuit Judge. Connection Distributing, Rondee Kamins, Jane Doe, and John Doe ("Plaintiffs") appeal the judgment of the district court granting summary judgment to the government. Plaintiffs had challenged the recordkeeping requirements 18 U.S.C. § 2257 placed upon producers of images of "actual sexually explicit conduct" as violative of the First Amendment. We conclude that the statute is overbroad and therefore violates the First Amendment, and accordingly we reverse the district court's judgment and remand with instructions to enter summary judgment for the plaintiffs.

BACKGROUND

I. The Challenged Statute

Congress passed the Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, 4485-4503 (1988) ("Act") to further support its laws against child pornography. Among other things, it required producers of certain kinds of photographs to maintain records regarding the individuals depicted. Congress subsequently modified the recordkeeping provisions twice, with the Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, Title III, §§ 301(b), 311, 104 Stat. 4808 (1990), and the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21 § 511, 117 Stat. 650 (2003).

All the various amendments have made the reach of the recordkeeping requirements of 18 U.S.C. § 2257 extensive. While the requirements apply only to producers, that term is defined broadly. Producers include all those who actually create a visual representation of actual sexually explicit conduct, through videotaping, photographing, or computer manipulation. 18 U.S.C. § 2257(h)(2)(A)(i) (2006). These kinds of producers are defined as "primary producers" under the regulations issued by the Attorney General. 28 C.F.R. § 75.1(c)(1) (2006). Those who, for commercial purposes, use such images for "assembling, manufacturing, publishing, duplicating, reproducing, or reissuing" any material containing that image, from a photograph to a magazine or film, are also producers. 18 U.S.C. § 2257(h)(2)(A)(ii) (2006). Finally, those who upload such images to a website or otherwise manage the content of the website are considered producers. *Id.* § 2257(h)(2)(A)(iii) (2006). These last two types of producers are considered "secondary producers" under the applicable regulations. 28 C.F.R. § 75.1(c)(2) (2006). On the other hand, those who process images and have no commercial interest in such images, those who merely distribute the images, those who provide Internet or telecommunications services, or who store, retrieve, host, format, or translate the communication without selecting or altering its content are not producers. 18 U.S.C. § 2257(h)(2)(B) (2006); 28 C.F.R. § 75.1(c)(4) (2006). They are, however, required to verify that the required records have been kept by the creator and that disclosure statements are attached to the images. 18 U.S.C. § 2257(f)(4) (2006).

Image producers are only regulated if the images are of "actual sexually explicit conduct."18 U.S.C. § 2257(a)(1) (2006). "Actual sexually explicit conduct" is defined to include images of "sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex." 18 U.S.C. § 2257(h)(1) (2006); *see* 18 U.S.C. § 2256(2)(A)(i) (2006). It also includes images of bestiality, masturbation, sadistic or masochistic abuse, and "lascivious exhibition of the genitals or pubic area of any person." 18 U.S.C. § 2257(h)(1) (2006); *see* 18 U.S.C. § 2256(2)(A)(ii)-(v) (2006).

If a person is producing such images, she or he is subject to the recordkeeping requirements. The producer must inspect the depicted individual's government-issued picture identification and ascertain her or his name and date of birth. 18 U.S.C. § 2257(b)(1) (2006); 28 C.F.R.§ 75.2(a)(1). The producer must then make a photocopy of the ID, ascertain and record any aliases the person has used in the past, photocopy the image, record where the image is published if it is published on the Internet, and then file in alphabetical or numerical order all of this information in separately maintained records. 18 U.S.C. § 2257(b) (2006); 28 C.F.R. § 75.2(a), (d), (e). These records are then subject to inspection by agents of the Attorney General, without advance notice, up to once every four months and more often if there is "a reasonable suspicion to believe that a violation . . . has occurred . . . ." 18 U.S.C. § 2257(c) (2006); 28 C.F.R. § 75.5(b), (c), (d) (2006).

If the person is required to keep such records, then she or he is also required to affix a statement to the image. The statement has to contain either a title or identifying information, the date of production, and a street address of the place where the records are being maintained. 18 U.S.C. § 2257(e) (2006); 28 C.F.R. § 75.6(a), (b). The statement must be in at least 12-point font or no smaller than the second-largest typeface on the material, and it must be printed in a color that contrasts with the background. 28 C.F.R. § 75.6(e) (2006). Additionally, the statement must be "prominently displayed" on or in the depiction. Some materials, such as books, have a more precise definition of what is required for "prominent[] display." *Id.* § 75.8.

Failure to create or maintain these records, making a false or inappropriate entry in kept records, or failure to affix the required statements to such images results in stiff penalties. 18 U.S.C. § 2257(f)(1), (3) (2006). The producer would be guilty of a felony punishable up to five years in prison as well as subject to fines. *Id.* § 2257(i). For a second offense, she or he would be subject to a minimum of two years and a maximum of ten years in prison plus a fine. *Id.* Selling, transferring, or offering to sell or transfer any material, such as a book or magazine, which includes a depiction of actual sexually explicit conduct without the disclosure statement, with certain exceptions, is a violation of the statute similarly punishable. *Id.* § 2257(f)(4).

II. Factual Background

As we explained in an earlier iteration of this case:

> Connection publishes and distributes approximately a dozen so-called "swingers" magazines. Connection defines the philosophy of "swinging" as: "an alternative social and sexual lifestyle comprised mostly of mature adults who believe in sexual freedom and do not believe in sexual monogamy." Connection's magazines contain, in addition to editorials and feature stories, messages placed by persons whose beliefs and philosophies embrace the "swinging" lifestyle. These individuals and couples place and respond to messages in Connection's various magazines. The messages . . . frequently are accompanied by sexually explicit photographs of the subscribers. Some messages include photographs with persons simply nude or in street clothes, but many feature individuals or couples engaged in sexually explicit conduct . . . . [T]he majority of the people submitting messages identify themselves through a code that appears at the beginning of the text of

> each message. Readers respond by writing to Connection, which charges a fee to forward the response to the message placer. Connection also offers 900 number voice mailboxes for individuals who wish to respond by telephone, as well as an Internet service.

Connection Distrib. Co. v. Reno, 154 F.3d 281, 285 (6th Cir. 1998) (*Connection I*) (footnotes and citations omitted). The individual plaintiffs in this case are persons who would like to publish their photographs in Connection's magazines, but are unwilling to do so because they do not wish to create and maintain the required records nor do they wish to provide Connection with identification, which Connection must have to comply with the recordkeeping provisions at issue.

III. Procedural History

Connection filed a declaratory judgment action in September 1995 challenging the facial and as-applied constitutionality of the recordkeeping requirements of 18 U.S.C. § 2257, and asking for an injunction against enforcement. Connection asked for a preliminary injunction based on its as-applied challenge, which the district court denied in January 1997. This Court upheld the district court's denial of a preliminary injunction based on Connection's as-applied challenge to the statute. *Connection I*, 154 F.3d 281.

Upon remand, the district court granted the government's motion for summary judgment. Connection appealed, and the case came to this Court again. A second panel reversed the district court's grant of summary judgment. *Connection Distrib. Co. v.*

Reno (*Connection II*), 46 F. App'x 837 (6th Cir. 2002) (per curiam) (unpublished). It held that while intermediate scrutiny constituted law of the case for Connection's as-applied claim, the district court on remand should reconsider "all other respects . . . in light of recent Supreme Court decisions." *Id.* at 837-38. We note preliminarily that this opinion will not deal with the law of the case doctrine regarding the previous opinions, as here we evaluate the plaintiffs' facial claims, rather than Connection's as-applied challenges with which the previous opinions dealt; we are deciding this case on overbreadth grounds, which allows parties to raise claims third parties could bring, rather than just their own claims, which the previous opinions addressed.

On remand the district court allowed additional discovery, and also allowed Connection to amend its complaint. Connection added three plaintiffs, Rondee Kamins, its publisher, and two Doe plaintiffs, who wish to publish sexually explicit images in Connection's magazines. Connection also added a Fifth Amendment challenge to the statute. This challenge was in response to Congress's amending of § 2257 to allow the records kept to be used by the government for prosecuting more crimes than recordkeeping violations, which is all the statute previously had allowed. PROTECT Act, Pub. L. No. 108-21 § 511, 117 Stat. 650, 684-85 (2003).

The government then moved to dismiss the amended complaint or, in the alternative, for summary judgment. The plaintiffs sought a preliminary injunction to prevent enforcement of the amended statute, as well as the subsequently enacted regulations. The district court considered the remand narrow, and therefore only evaluated its previous conclusions with respect to the four specific Supreme Court cases mentioned in the decision vacating its previous grant of summary judgment to the government.[1] It concluded that these cases did not change its analysis, and therefore reaffirmed its conclusion that the statute did not violate the First Amendment. The district court also rejected the plaintiffs' argument that the statute violated the Fifth Amendment. The district court therefore denied the plaintiffs' request for a preliminary injunction and granted the government's motion for summary judgment, and plaintiffs timely appealed.

ANALYSIS

Plaintiffs argue on appeal that the district court erred in granting summary judgment for the government. Grants of summary judgment are reviewed de novo. *Bender v. Hecht's Dept. Stores*, 455 F.3d 612, 619 (6th Cir. 2006). Summary judgment is granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party, the defendant here, first carries the burden of proving that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*,

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[1] The cases mentioned were *Watchtower Bible & Tract Society of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150 (2002), *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), and *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000). *Connection II*, 46 F. App'x at 837.

477 U.S. 316, 323 (1986). This case involves no genuine issue of material fact; rather, the disagreement is about the proper legal framework to apply to the undisputed facts. Questions of law are reviewed de novo. *Johnson v. Jones*, 149 F.3d 494, 499 (6th Cir. 1998). Because the district court's analysis of the overbreadth of the statute was incorrect, the grant of summary judgment for the government is REVERSED, and, because plaintiffs are entitled to summary judgment, the case is REMANDED with instructions to enter judgment for the plaintiffs.

I. Statutory Construction

When engaging in an overbreadth analysis, we must first examine the scope of the statute and try to construe that scope narrowly to avoid constitutional infirmity. *Ferber*, 458 U.S. at 769 n.2 ("When a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction."). "In considering a facial challenge, this Court may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction." *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 884 (quoting *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988)). "This Court 'will not rewrite a . . . law to conform it to constitutional requirements.' " *Am. Civil Liberties Union*, 521 U.S. at 884-85 (quoting *Virginia v. Am. Bookseller's Ass'n, Inc.*, 484 U.S. 383, 397 (1988)).

The breadth of the recordkeeping provisions here cannot be narrowed. By its clear, unambiguous terms, the statute applies to any "producer" of photographs depicting actual sexually explicit conduct, 18 U.S.C. §

2257(a), and "produces" is defined to include anyone who creates the visual representation, for instance a photographer or videographer, as well as anyone who subsequently publishes the image, *id.* § 2257(h)(2). This means that couples submitting photographs to Connections, or any couples who take photographs for their own personal use, must create the required records upon creation of the image because either one has or both have "produced" regulated images. The statute by its plain terms makes no exception for photographs taken without a commercial purpose, for photographs intended to never be transferred, or for photographs taken with any other motivation. If the photograph depicts actual sexually explicit conduct, a record must be kept by the person creating the image. Additionally, the disclosure statement regarding where the records are kept must be affixed to every image created, regardless of whether a person plans on selling or otherwise transferring the image. *Id.* § 2257(e)(1), (f)(3). It is a separate violation of the statute if a person, including the creator, wishes to sell or otherwise transfer a photograph without a disclosure statement and either does so or offers to do so. *Id.* § 2257(f)(4).

This reach is extremely broad, and the most commonsense limitation, for which the statute and regulations provide some support, would be to limit the statute's reach to photographs taken for a commercial purpose, that is, photographs taken for the purpose of sale.[2] While there are some hints Congress may have intended such a limitation, these hints are insufficient to contradict the plain language of the statute.

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[2] The statute requires records to be kept "at [the producer's] business premises . . . ." *Id.* § 2257(c). The regulations limit secondary producers to those who compile regulated photographs into an item "intended for commercial distribution."

The plain text and definitions of the terms used admit of no commercial limitation on who will be considered producers. While the statute does say that records should be kept at a producer's "business premises," it follows up with allowing records to be kept "at such other places as the Attorney General may by regulation prescribe." 18 U.S.C. § 2257(c). The word "produces" merely means "creates" according to the statute, and a person can create an image for noncommercial motivations just as a person can create an image for commercial reasons. *See id.* § 2257(h)(2)(A)(i). The inspection regulation reinforces the notion that a person does not have to be in the business of producing such images to be covered by the statute. While the regulation provides that inspections will occur during "normal business hours," it also deals with those producers who "do[] not maintain at least 20 normal business hours per week." 28 C.F.R. § 75.5(c)(1). Additionally, and perhaps most persuasively, Congress knew how to limit the statute's reach to the commercial context because it chose to require only commercially-motivated publishers, termed secondary producers by the regulations, to keep records. *See* 18 U.S.C. § 2257(h)(2)(A)(ii) (2006).

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28 C.F.R. § 75.1(c)(2). The regulations also require the records to be made "available at the producer's place of business . . . [and provides that] [i]f the producer ceases to carry on business, the records shall be maintained for five years thereafter." *Id.* § 75.4. Additionally, inspection of the records is limited to "normal business hours . . . or at any other time during which the producer is actually conducting business relating to producing depiction[s] of actual sexually explicit conduct." *Id.* § 75.5(c)(1).

Congress did not, however, include a requirement that the creators of the images, termed primary producers by the regulations, intend to commercially distribute the images before being subject to the recordkeeping requirements. *See id.* § 2257(h)(2)(A)(I).

The legislative history of the Act reinforces a reading which does not limit the recordkeeping requirements to those in the business of creating the regulated images. Congress's purpose was to prevent child abuse and to aid the government in establishing the age of persons depicted in any photographs of actual sexually explicit conduct that come to the attention of the police. *See, e.g., Am. Library Ass'n*, 33 F.3d at 86; *see also* 1 ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY: FINAL REPORT 620 (1986). Congress therefore required recordkeeping by everyone taking such photographs, no matter the purposes. Parents, relatives, and others may abuse children and photograph the abuse with no commercial motivation or commercial intent, and Congress sought to stop all such abuse. *See Am. Library Ass'n*, 33 F.3d at 86. Additionally, there will be photographs found by the police without a paper trail of their provenance if records must only be kept by those in the business or who have commercial intent at the time of creation. Photographs could be found in a private house that are in digital format and of unclear origin, and law enforcement would face the same trouble in proving the age of that individual depicted as it faces with commercially distributed images. Indeed, the government argues that the recordkeeping requirements must be "universal" to achieve its purpose. Def.'s Br. at 32. In addition, one of the reasons the police would like to know whether the person depicted is a child is to stop the circulation of the picture, because Congress believes, and the Supreme Court has recognized, that continued circulation harms the psyche of the child. *Free Speech Coal.*, 535 U.S. at 249-50; *see* J.A. at 118. This harm occurs even if the picture was created for noncommercial reasons and it was shared or lost or otherwise put into circulation.

Universal coverage comports with the testimony received before Congress and statements made by members of Congress. While Congress was no doubt very concerned with the commercial creation of child pornography, senators talked about "eradicating" all child pornography. *Child Protection and Obscenity Enforcement Act and Pornography Victims Protection Act of 1987: Hearing on S. 2033 and S. 703 Before the S. Comm. on the Judiciary*, 100th Cong. 2 (1988) [hereinafter *Senate Hearing*] (statement of Senator DeConcini), J.A. at 103. Congress heard testimony about how computer networks were used to "propose trades of homemade child pornography which is *produced* when pedophiles record the sexual abuse of children on film or videotape." *Senate Hearing* at 27 (testimony of H. Robert Showers, Executive Director, National Obscenity Enforcement Unit, U.S. Department of Justice [hereinafter Showers]), J.A. at 115 (emphasis added). Congress was told that "[c]hild pornography itself is nothing less than the sexual abuse, rape, and molestation of real children, permanently captured on film, for the profit, *entertainment* and *gratification* of child molesters." *Senate Hearing* at 32 (testimony of Showers), J.A. at 118 (emphasis added). Indeed, Senator Hatch, a sponsor of the Act, stated that he believed existing statutes had "been fairly successful in putting an end to the regular monthly publications that appeared on some news stands," but that the recordkeeping provisions and other aspects of the Act were required because "the supply of these materials for an ever increasing market has shifted to a well-organized network of child molesters who simply make their own recordings or photographs and share them between themselves."[3] *Senate Hearing* at 110 (statement of Senator Hatch), J.A. at 157. Indeed, a "commercial purpose" limitation was proposed by the ACLU for the crime of transferring obscenity, and Senator Humphrey considered such a limitation inimical to Congress's purpose in ensuring that such images are taken out of circulation, commercial or otherwise, so as to not fall into the hands of children. *Senate Hearing* at 81 (statement of Senator Humphrey), J.A. at 142. The recordkeeping provisions have a similar purpose of ending circulation of child pornography, and a commercial purpose limitation would similarly fail to fully accomplish Congress's objective.

The plain text, the purpose, and the legislative history of the statute make clear that Congress was concerned with all child pornography and considered recordkeeping important in battling all of it, without respect to the creator's motivation. There is, therefore, no narrowing construction. *See Am. Civil Liberties Union*, 521 U.S. 844, 884-85 (1997) ("[W]e declined to 'dra[w] one or more lines between categories of speech covered by an overly broad statute, when Congress has sent inconsistent signals as to where the new line or lines should be drawn' because doing so 'involves a far more serious invasion of the legislative domain.' " (quoting *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 479 n.26 (1995)) (alteration in original) ("This Court 'will not rewrite a . . . law to conform it to constitutional requirements.'" (quoting *Virginia v. Am. Bookseller's Ass'n, Inc.*, 484 U.S. 383, 397 (1988))); *City of Houston v. Hill*, 482 U.S. 451, 468 (1987) ("This ordinance is not susceptible to a limiting construction because . . . its language is plain and its meaning unambiguous."). With the reach of the statute properly defined, we now turn to the overbreadth analysis.

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[3] Many of the stories told by victims of child abuse who had been photographed described situations which did not clearly rise to the level of a commercial enterprise, or even clearly suggest a profit motive for the taking of the photographs. *See, e.g.*, J.A. at 260 (family friends took Polaroids of daughter); J.A. at 265 (discussing collections of selfmade pornography whose existence torments victims because they are unsure if it has been "sold or traded to other collectors"); J.A. at 284 (school bus driver took photos of three young children); J.A. at 284 (teacher took photos of schoolgirl in the bathroom); J.A. at 285 (describing a "local child pornographer" who "shared" images); J.A. at 288-89 (describing the difficulty in locating pornographic pictures of children taken by "amateurs").

II. Facial Overbreadth

The overbreadth doctrine allows a party to challenge a statute on its face, even if the statute would be considered constitutional as applied to that party. *Broadrick v. Oklahoma*, 413 U.S. 600, 612 (1973). "In order to decide whether the overbreadth exception is applicable in a particular case, we have weighed the likelihood that the statute's very existence will inhibit free expression." *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 787, 799 (1984). There are a few considerations to be weighed when determining overbreadth. The first is whether and to what extent the statute reaches protected conduct or speech. *Village of Hoffman Estates v. Flipside. Hoffman Estates, Inc.*, 455 U.S. 486, 494

(1982) ("In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." (footnotes omitted)). The second is determining the "plainly legitimate sweep" of the statute, that is, the sweep that is justified by the government's interest. *See Broadrick*, 413 U.S. at 615; *cf. Taxpayers for Vincent*, 466 U.S. at 810 ("[T]he application of the ordinance in this case responds precisely to the substantive problems which legitimately concerns the City."). The third is determining the likely chilling effects of the statute, stated otherwise as the statute's burden on speech. *See Broadrick*, 413 U.S. at 615; *see also Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (unanimous); *Taxpayers for Vincent*, 466 U.S. at 800 n.19; *New York v. Ferber*, 458 U.S. 747, 773 (1982). The last step involves weighing these various factors together, paying particular attention to the burden on speech when judging the illegitimate versus legitimate sweep of the statute. *Broadrick*, 413 U.S. at 615 ("[P]articularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."); *see Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 165 (2002) ("We must also look, however, to the amount of speech covered by the ordinance and whether there is an appropriate balance between the affected speech and the governmental interests that the ordinance purports to serve.").

A. Type of Speech at Issue

Before engaging in the overbreadth analysis, we must first identify whether the expression at issue is conduct or speech. Conduct is generally considered more amenable to regulation than speech, because while particular conduct could be expressive, it may not be inherently expressive like speech. *See Free Speech Coal.*, 535 U.S. at 253 ("To preserve [free speech] freedoms, and to protect speech for its own sake, the Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct."); *Broadrick*, 413 U.S. at 615 (noting that a statute must be substantially overbroad, particularly where conduct is concerned); *see also Cameron v. Johnson*, 390 U.S. 611, 617 (1968) (upholding a law on the basis that it regulates conduct that is not inherently expressive and therefore only tangentially and insubstantially burdens speech).

The government argues that the recordkeeping requirements are simply aimed at conduct, because it seeks to reduce child abuse by its regulation. Indeed, the Supreme Court recognized in *Ferber* that the very reason child pornography can be regulated is because it is so closely tied to the conduct, child abuse, which the government was trying to stamp out. *Ferber*, 458 U.S. at 761. The D.C. Circuit accepted the government's argument, and therefore evaluated the statute at issue under the *O'Brien* standard. *Am. Library Ass'n v. Reno*, 33 F.3d 78, 87 (D.C. Cir. 1994).

This argument is unpersuasive. While the government is indeed aiming at conduct, child abuse, it is regulating protected speech, sexually explicit images of adults, to get at that conduct. To the extent the government is claiming that a law is considered a conduct regulation as long as the government claims an interest in conduct and not speech, the Supreme

Court has rejected that argument. *See, e.g., Schneider v. State*, 308 U.S. 147, 150 (1939) (holding that the government cannot ban handbills, speech, to vindicate its interest in preventing littering, conduct). The expression at issue here is not conduct, it is speech. Images, including photographs, are protected by the First Amendment as speech as much as "words in books" and "oral utterance[s]." *Kaplan v. California*, 413 U.S. 147, 119-20 (1973). Indeed, visual images are "a primitive but effective way of communicating ideas . . . a short cut from mind to mind." *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 632 (1943). Even if the government tried to characterize the regulation as aimed at the conduct of pressing the button on a camera or other recording device to create images, that conduct would be so closely tied to the speech produced, and the government's interest here is in the speech produced, that it would be better considered to be a speech regulation.

Child abuse, the actual conduct in which the government is interested, is already illegal. Child pornography, while speech, can be considered more like conduct because the conduct depicted is illegal, and if that illegality did not occur, no images of child pornography would be created. *Ferber*, 458 U.S. at 762 ("We note that were the statutes outlawing the employment of children in these films and photographs fully effective, and the constitutionality of these laws has not been questioned, the First Amendment implications would be no greater than that presented by laws against distribution: enforceable production laws would leave no child pornography to be marketed."). Banning the images of child pornography, therefore, is not a burden on speech, and can therefore be considered more of a conduct regulation, because the speech would not be created absent the illegal conduct. This reasoning would not necessarily apply to all pictures of illegal conduct, such as a newspaper article accompanied by a photograph of a person being mugged. Child pornography is different from other photographs of illegal conduct because the images more directly relate to the illegal conduct; when an individual is taking photographs of child abuse, it is likely that the taking of pictures is a motivator of the illegal conduct, and therefore the speech is more "intrinsically related" to the conduct. *Ferber*, 458 U.S. at 759-60; *cf. Free Speech Coal*, 535 U.S. at 250 ("Virtual child pornography is not 'intrinsically related' to the sexual abuse of children, as were the materials in *Ferber*.").

This analysis of child pornography, that it is closer to conduct and not speech, does not control when determining whether images of adult sexual conduct are speech or conduct. Adult sexual conduct is not illegal and it is in fact constitutionally protected. *See, e.g., Lawrence v. Texas*, 539 U.S. 558 (2003). The regulation of visual depictions of adult sexual activity is not based on its intrinsic relation to illegal conduct. It is, therefore, a regulation of speech, because both the photograph and the taking of a photograph "bear[] [a] necessary relationship to the freedom to speak, write, print or distribute information or opinion." *Schneider*, 308 U.S. 147, 150 (1939). This leads us to the overbreadth considerations.

B. Amount of Protected Speech Impacted

The first consideration in an overbreadth challenge is the amount of protected speech reached by the statute. *Flipside, Hoffman Estates, Inc.*, 455 U.S. at

494. As described in Section I, the recordkeeping provisions have an extensive reach. Records are required to be kept and disclosure statements are required to be affixed by any person who takes a photograph or films a movie depicting actual sexually explicit conduct. This conduct is defined as "sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex." 18 U.S.C. § 2257(h)(1) (2006); *see* 18 U.S.C. § 2256(2)(A)(i) (2006). It also includes bestiality, masturbation, sadistic or masochistic abuse, and "lascivious exhibition of the genitals or pubic area of any person." 18 U.S.C. § 2257(h)(1) (2006); *see* 18 U.S.C. § 2256(2)(A)(ii)-(v) (2006). This means that a married couple who videotape or photograph themselves in the bedroom engaging in sexually explicit conduct would be required to keep records, affix disclosure statements to the images, and hold their home open to government agents for records inspections.

This reach sweeps in a lot of protected speech. This includes images which amount to obscenity but are kept in the privacy of one's home and are therefore constitutionally protected speech. *Stanley v. Georgia*, 394 U.S. 557, 564-68 (1969). Nonobscene sexually explicit images of adults are also considered protected speech and are covered by the statute. *See Free Speech Coal.*, 535 U.S. at 250-51 ("[*New York v. Ferber*] reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment."); *see also Am. Civil Liberties Union*, 521 U.S. at 874; *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72-73 (1994); *Sable Commc'ns of Ca., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (unanimous); *Osborne v. Ohio*, 495 U.S. 103, 112 (1990); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 490, 498-99 (1985). Additionally, the First Amendment protects an individual's right to speak anonymously. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995) ("[A]n author's decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment."). This statute not only regulates a person's right to take sexually explicit photographs, but it also requires that person to identify him or herself as the photographer as well as identify the individual depicted. While the individual depicted is shown in the photograph, that person still has a First Amendment right to not provide his or her name and therefore retain a certain level of anonymity. *See Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 536 U.S. at 167 ("The fact that circulators revealed their physical identities did not foreclose our consideration of the circulators' interest in maintaining their anonymity [in *Buckley v. Valeo*, 424 U.S. 1 (1976)]."). It is clear that this statute covers quite a bit of protected speech.

C. Legitimate Sweep

Because the statute reaches protected speech, it is necessary to determine the statute's "plainly legitimate sweep." *Broadrick*, 413 U.S. at 615. This requires identifying the government's interests. There are two interests here: (1) being able to know the age of a person depicted and the location of the producer so as to effectively prosecute individuals for child abuse and production of child pornography; and (2) protecting children against abuse. These interests relate to stamping out child pornography.

Child pornography is clearly within the legitimate sweep of this statute. It is uncontested that the government may regulate or otherwise ban child pornography. *Osborne*, 495 U.S. at 109-15; *Ferber*, 458 U.S. at 773. The government imposing recordkeeping regulations on the producers of child pornography is surely legitimate; it helps accomplish the government's compelling interest in safeguarding the physical and psychological well-being of minors. *See Osborne*, 495 U.S. at 109-10; *Sable Commc'ns of Ca., Inc.*, 492 U.S. at 126.

Applying the recordkeeping regulations to all depictions of actual sexually explicit conduct between two adults, however, is not clearly within the statute's plainly legitimate sweep. One of the reasons the government wants to know a depicted individual's age is because the government has a difficult time knowing when to prosecute as well as prosecuting successfully because it is hard to identify the image as that of a child. The government claims that such identification is made difficult because images of individuals eighteen and older exist. If these images did not exist, then the only images left would be children, and therefore the proof would be easy. The solution, it is argued, is to require photographs of both adults and children to be kept track of, so that the government will know that a photo it is currently viewing is not of a child but in fact of an eighteen-year-old.

This reasoning has been rejected by the Supreme Court. In *Ashcroft v. Free Speech Coalition* the government made the exact same argument for upholding a law against possessing or creating images that "appear to be" children; if there are all these images out there that "appear to be" children but are not, then the defense will claim, and the government will have difficulty contradicting, that these images are the ones that merely resemble child pornography. 535 U.S. at 254-55. The Supreme Court rejected this argument, saying that it "turns the First Amendment upside down." *Id.* "Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse." *Id.* at 255.

Indeed, much of the statute's sweep would not be legitimated even if this case does not foreclose the government's ability to regulate so as to prevent defenses and aid prosecution in this manner. This statute covers images of actual sexually explicit conduct regardless of the obvious age of those depicted and regardless of whether or not the photographer actually knows the age of the person being photographed, for instance if the person being photographed is the photographer's significant other. These images are not within the "legitimate sweep" of the statute because it does not vindicate the government's interest to cover them.

While the government argues that coverage of these images is legitimate because subjective determinations of a person's age lead to uneven enforcement and greater difficulty in prosecution, J.A. at 32, this does not seem to be the case. The government's own expert testified that he did not need photo identification to conclude that the "vast majority" of individuals depicted in a handful of Connection's magazines were over the age of twenty-one. J.A. at 479. He further stated that he would not expect anyone else to need photo identification to come to that conclusion. J.A. at 479. It is also noteworthy that the government has before argued that such a subjective determination is not so difficult to ask people to make nor too difficult for the government to enforce. *See United States v. Acheson*, 195 F.3d 645, 652-53 (11th Cir. 1999), *abrogated by Free Speech Coal.*, 535 U.S. 234; *United States v. Hilton*, 167 F.3d 61, 73-76 (1st Cir. 1999), *abrogated by Free Speech Coal.*, 535 U.S. 234. We see no reason why an age limitation, such as one that requires the person depicted appear to be a child before records must be kept, could not be employed here.

The government contends in this case, however, that "appears to be" a child is not a sufficient sweep because there are photographs solely of body parts, and a secondary producer, who would not necessarily meet the individual in person, would find it too difficult to apply such a standard. Def.'s Br. at 32. This argument is unconvincing. There is no reason the government could not satisfy this interest by regulating those images that depict only body parts without a significant amount of context portrayed to adequately appraise the depicted individual's age. Indeed, Justice Thomas in his concurrence in *Free Speech Coalition* suggested that "if technological advances thwart prosecution of 'unlawful speech,' the Government may well have a compelling interest in barring or otherwise regulating some narrow category of 'lawful speech' in order to enforce effectively laws against pornography made through the abuse of real children." 535 U.S. at 259. Even he would limit the government to "some narrow category of 'lawful speech,' a category for which the government has not here argued or defined.

D. Burden

The burden on protected speech is also part of the inquiry into a statute's overbreadth. *Ferber*, 458 U.S.

at 773 ("[T]he penalty to be imposed is relevant in determining whether demonstrable overbreadth is substantial."); *see also Taxpayers for Vincent*, 466 U.S. at 799 ("In order to decide whether the overbreadth exception is applicable in a particular case, we have weighed the likelihood that the statute's very existence will inhibit free expression."). This recordkeeping statute imposes multiple burdens. It bans anonymous images of actual sexually explicit conduct, and if records are not kept (if anonymity is not sacrificed), the person is guilty of a felony punishable by up to five years in prison and fines. 18 U.S.C. § 2257(a), (b), (f). The statute also requires all producers to keep records on each image and affix disclosure statements to the images. *Id.* § 2257(b), (e). While this burden may not be that large for a commercial entity, it is likely to be more burdensome for those motivated by noncommercial purposes. Indeed, the Supreme Court has recognized that imposing regulations on noncommercial sexually explicit speech is a burden that may be too great and consequently chill speech. *See Am. Civil Liberties Union*, 521 U.S. at 865. The statute here effectively bans creation of sexually explicit images unless such records are kept. The statute additionally burdens those that wish to publish photographs, as they are disallowed from doing so unless such records are kept, even if they did not take the photograph and have no other way to track the performers down to create the records. *Id.* § 2257(a), (h)(2)(A). Lastly, the statute burdens speech because it not only requires the person to keep records, it also allows the government to enter the premises where the records are kept at least once every four months, and perhaps more often, to inspect such records. *Id.* § 2257(c); 28 C.F.R. § 75.5 (2006).

These burdens lead to significant chilling effects. *See Hicks*, 539 U.S. at 119 ("We have provided this expansive remedy[, the overbreadth doctrine,] out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions."). The first chilling effect stems from the breadth of the statute; "[t]he ordinance's plain language is admittedly violated scores of times daily, yet only some individuals . . . are arrested" and prosecuted. *See Hill*, 482 U.S. at 466-67. There are likely many violations occurring because people without commercial motivations may not realize that the recordkeeping requirements apply to their speech. This leads to chilling because it means that enforcers can seek out and silence particularly disliked people or speech. *See Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940); *see also Taxpayers for Vincent*, 466 U.S. at 798 & n.16.

Producers are also chilled if they are aware that the statute applies to all photographs of such conduct. To appreciate why speech would be chilled, consider the following. A couple wishes to take photographs of themselves engaging in sexual activity. To do so means compiling records, affixing statements, maintaining such records for at least five years, and opening their property up for visitation by government officials to inspect the records. It seems unlikely the couple would choose to speak when faced with such requirements, which if violated means being guilty of a felony punishable by up to five years in prison plus fines. The Supreme Court has recognized that a registration requirement imposes an "objective burden," which it thought would chill speech. *Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 536 U.S. at 167. Indeed, the

Supreme Court has before stated that identification requirements tend to restrict speech. *Talley v. California*, 362 U.S. 61, 64 (1960). These requirements, which burden speech, are lighter burdens than those at issue here; registration is easier than filling out forms, storing them, affixing statements to images (statements which must contrast with the background of the photograph, be in at least twelve-point font, and be prominently displayed), and allowing inspections on her or his property.

Additionally, this statute "unquestionably attaches" criminal penalties to protected speech. A person's right to speak anonymously and a person's right to take photographs of adult actual sexually explicit conduct are protected. "[W]here the statute unquestionably attaches sanctions to protected conduct, the likelihood that the statute will deter that conduct is ordinarily sufficiently great to justify an overbreadth attack." *Taxpayers for Vincent*, 466 U.S. at 800 n.19; *see also Free Speech Coal.*, 535 U.S. at 244 ("[A] law imposing criminal penalties on protected speech is a stark example of speech suppression. . . . [E]ven minor punishments can chill protected speech . . . ."). People may choose to forego creating these photographs because losing their anonymity may subject them to " 'economic or official retaliation, . . . social ostracism, or merely . . . [destruction of too] much of one's privacy . . . .' " *Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 536 U.S. at 166 (quoting *McIntyre*, 514 U.S. at 341-42). Despite the fact that these records will not necessarily be open to the public, the statute does not provide for confidentiality, and therefore the anonymity analysis is not altered. *See Shelton v. Tucker*, 364 U.S. 479, 486 (1960) (pointing out that a statute requiring disclosure chills speech when there is no guarantee of confidentiality). These burdens are considerable.

E. Weighing

The final step in the overbreadth analysis is weighing the above considerations against and with one another to determine whether or not the statute is facially invalid. *Broadrick*, 413 U.S. at 615. Before beginning the analysis, it is important to first note that applying the overbreadth doctrine to strike down a statute on its face "is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort." *Id.* at 613. Even though overbreadth is a doctrine to avoid the chilling effects of an overbroad law, "there are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct." *Hicks*, 539 U.S. at 119 (emphasis in original). It must be ensured that a decision "carefully ties" the use of the doctrine "to the circumstances in which facial invalidation of a statute is truly warranted." *Ferber*, 458 U.S. at 769. With this carefulness and prudence in mind, we are directed to gauge whether "the overbreadth of [the] statute . . . [is] real, [and] substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615; *see also Leonardson v. City of East Lansing*, 896 F.2d 190, 195-96 (6th Cir. 1990).

The recordkeeping statute fails this test. While constitutionally protected photographs of adult sexually explicit conduct and anonymity regarding one's depiction do not seem as vital to free speech and the country as political debate, "[w]e cannot be influenced . . . by the perception that the regulation in question is not a major one because the speech is not very important. The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly." *Playboy Entm't Group, Inc.*, 529 U.S. at 826.

> [T]he mere fact that a statutory regulation of speech was enacted for the important purpose of protecting children . . . does not foreclose inquiry into its validity. As we pointed out last Term, the inquiry embodies an "overarching commitment" to make sure that Congress has designed its statute to accomplish its purpose "without imposing an unnecessarily great restriction on speech."

Am. Civil Liberties Union, 521 U.S. at 875-76 (quoting *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996)) (footnotes omitted). The burden this recordkeeping statute places on protected speech is large; the statute unquestionably chills speech, particularly because violations are felonies punishable by up to five years in prison and a mandatory two years with a maximum of ten years in prison for a second offense. The government's interest in preventing child abuse and the consequent child pornography is "compelling," *Osborne*, 495 U.S. at 109-10, but it has to be balanced against the First Amendment right to free expression, *Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 536 U.S. at 163. The proper balance has not been struck by a recordkeeping statute that sweeps in a lot of protected speech, an amount of protected speech that may well be greater than the amount of unprotected speech covered by the statute.

No one has argued, and it seems unlikely, that there is more child pornography in existence than adult pornography. While it is Congress's province to strike the proper balance between eradicating child pornography and safeguarding protected speech, this Court has the responsibility to ensure that protected speech is not overly burdened.

The government, however, argues that regulating all photographs of adult sexually explicit conduct is necessary to vindicate its interest in "eradicating" the unprotected speech. Def.'s Br. at 32. This is not the first time the government has alleged an all-encompassing statute was necessary to vindicate its interest in enforcing its valid criminal laws. In *Smith v. California* the government argued that it was necessary to omit scienter as an element of obscenity, otherwise prosecutions would fail because it would be impossible to prove commercial sellers knew the contents of an item were obscene. 361 U.S. 147, 154-55 (1959). The government asserted in *Stanley v. Georgia* that it was necessary to criminalize possession of obscenity because otherwise it would be impossible to prove that a person intended to distribute it or did in fact distribute it. 394 U.S. at 567-68. The government declared in *McIntyre* that it was necessary to require identification on handbills to be able to enforce its laws against fraud, false light, and libel. 514 U.S. at 344. It made the same identification arguments in *Talley*. 362 U.S. at 64, 66. The government insisted in *Shelton* that requiring teachers to disclose all of their organizational associations was necessary for it to properly evaluate a teacher's competence and fitness. 364 U.S. at 487-88. The government claimed in *Hill* that it was necessary to criminalize any verbal abuse directed at a police officer to maintain public order. 482 U.S. at 464-66.

Finally, in a case similar to ours, the government alleged in *Free Speech Coalition* that banning virtual child pornography, which is created without using actual children, was necessary to effectively prosecute production and possession of child pornography, because doing so would deprive defendants of the ability to claim that the images were not real children.

In each of these cases, the Supreme Court ruled against the government and held the law facially invalid because of its overbreadth. The Court did not allow the government to criminalize private possession of obscene materials to prevent distribution because, it said, abridging freedom of speech "may not be justified by the need to ease the administration of otherwise valid criminal laws." *Stanley*, 394 U.S. at 567-68. The Court held that while proving scienter in an obscenity prosecution is not easy, the government cannot chill free speech by excising this element. *Smith*, 361 U.S. at 154-55. The Court called handbill identification requirements "an aid to enforcement" that rendered "ancillary benefits" to the government's valid criminal prohibition of fraud and libel. *McIntyre*, 514 U.S. at 349-51. It said while such an aid is "legitimate," it is not valid when it affects such a large amount of protected speech. *Id.* The Court stated that if the government wants to prevent fraud, deceit, false advertising, negligent use of words, obscenity, and libel, requiring identification on all handbills is not a legitimate way to do so because such an "ordinance is not so limited, and [Justice Harlan] th[ought] it will not do for the State simply to say that the circulation of all anonymous handbills must be suppressed in order to identify the distributors of those that may be of an 'obnoxious character." *Talley*, 362 U.S. at 66 (Harlan, J. concurring). The Court declared that such sweeping laws catch too many not involved in illegal conduct and speech, which here would be too many individuals not involved in child pornography. *See Hill*, 482 U.S. at 464-66. "As the Court observed over a century ago, "[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large." *Id.* (quoting *United States v. Reese*, 92 U.S. (2 Otto) 214, 221 (1876)).

The rationale of these cases applies here. Many individuals would unknowingly violate the recordkeeping provisions, particularly private individuals, who have no connection at all to child pornography, the problem the government is attempting to address. If all individuals who produce such photographs understood the obligations of the law, there is no doubt that many would choose to not create the images rather than creating the records, affixing the statements, maintaining the records, and opening their homes to government records inspectors. Indeed, many would choose not to create such images simply to preserve their interest in remaining anonymous.

The line the government has drawn here is very similar to the invalid line drawn in *Watchtower Bible & Tract Society of New York*. The government wanted to prevent fraud and crime perpetrated by individuals engaging in door-to-door visits. The Supreme Court stated that those going door-to-door for the purpose of consummating commercial transactions or soliciting funds could be regulated to prevent fraud and crime, because those two evils were more likely to occur when the individuals had such a purpose for going door-to-door. 536 U.S. at 168. While the individuals with those purposes could be regulated, the interest in preventing fraud and crime did not justify regulating others who had religious, political, or other advocacy purposes for going door-to-door. *Id.*

The government has drawn a similarly over-inclusive line here by including all sexually explicit photographs, whether created for commercial purposes or whether the individual depicted clearly looks older than a given age. While the evil the government seeks to prevent, child pornography, has a chance of being found beyond any carefully drawn line, a broader category is not justified when that chance is too slim. There is a chance of fraud and crime being perpetrated by individuals going door-to-door for religious, political, or other advocacy purposes, but that chance is not large enough to justify burdening all individuals engaging in that sort of speech.

We do not belittle the despicability of child pornography, and we appreciate the difficulties faced by the government. There are a myriad of limitations available, however, that would reduce the breadth of the recordkeeping requirements and would more narrowly focus on the government's interest and therefore remove some of the protected speech from the statute's coverage. Such limitations have been suggested by witnesses who testified before Congress and by the plaintiffs here. "Congress may pass valid laws to protect children from abuse, and it has. The prospect of crime, however, by itself does not justify laws suppressing protected speech." *Free Speech Coal.*, 535 U.S. at 245 (citation omitted).

The Supreme Court's decision in *Free Speech*

Coalition reinforces this reasoning. The government cannot "turn[] the First Amendment upside down" by over-burdening protected speech "merely because it resembles [unprotected speech]." *Id.* at 255. Indeed, here the government is burdening speech that, aside from being photographs of sexually explicit conduct, in no way resembles child pornography because the individual depicted may obviously be thirty or forty or fifty or sixty years old. "The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." *Id.* The recordkeeping requirements of 18 U.S.C. § 2257 are, therefore, facially unconstitutional for overbreadth.

F. Facial Invalidation

Once a statute is deemed overly broad, the last consideration is the remedy. The remedy could be facial invalidation or, as recognized by the partial dissent, the remedy could be severing the constitutionally problematic portion of the statute. *See Ferber*, 458 U.S. at 769 n.24 ("[I]f the federal statute is not subject to a narrowing construction and is impermissibly overbroad, it nevertheless should not be stricken down on its face; if it is severable, only the unconstitutional portion is to be invalidated."); *see also Denver Area Educ. Telecomms. Consortium, Inc.*, 518 U.S. at 767 (plurality); *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 370-74 (1971). While we would like to agree with the dissent and save this statute through severing, we do not believe we can and hence hold that the statute is facially invalid.

Severing this statute is not possible under the Supreme Court's caselaw. This case does not present a situation where adding a time period contemplated by Congress would alleviate the constitutional infirmity. *See Thirty-Seven (37) Photographs*, 402 U.S. at 370-74. Nor do we have a case where the parties before us represent the full extent of the overly broad applications of the statute. *See Brockett*, 472 U.S. at 503-05. Nor is this statute one where a particular subsection could be excised, leaving in place the vast majority of Congress's scheme. *See Denver Area Educ. Telecomms. Consortium, Inc.*, 518 U.S. at 767-68 (plurality). Instead, saving this statute requires more extensive editing, and we believe ourselves unable to intrude into Congress's domain in such a manner.

Severing, rather than rewriting, cannot be done in a manner that would adequately address Congress's expressed concerns. The partial dissent's suggested severing shows the difficulty of trying to so edit this statute; the recommended severing would greatly impair the scheme Congress created. For example, it is clear that Congress wanted to regulate publishers because it wanted to stop the repeated publication of images that depict minors. *See, e.g.*, *Ferber*, 458 U.S. at 759 & n.10. If publishers were required to keep records as well, they could not publish photographs of individuals unless they had records reflecting that the individuals are not minors. Under the partial dissent's proposition, however, no publisher, commercial or otherwise, would be covered by the statute. Instead, only those who create the depiction and pay the depicted individuals would have to keep records.

Congress acted when this statute was construed to be as constrained in the manner the partial dissent proposes, and it disapproved. Before the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No.

109-248, tit. V, §§ 501-507, 120 Stat. 587, 623-31 (2006), the statute could be fairly interpreted to have the limited coverage proposed by the partial dissent, but the Department of Justice regulations explained that the coverage was as extensive as the current statute. The Tenth Circuit invalidated the regulations, holding that the statute only covered those who had contact with the depicted performers. *Sundance Assocs., Inc. v. Reno*, 139 F.3d 804, 808 (10th Cir. 1998). Congress responded by amending the statute to cover all the activities, including publishing, that the previous regulations had covered. Senator Hatch stated that the Tenth Circuit's interpretation of the statute was incorrect, and that Congress had all along intended the scope of the statute to be as extensive as interpreted by the regulations. *See* 152 Cong. Rec. S7809, S7896 (daily ed. July 19, 2006) (statement of Senator Hatch).

The partial dissent's attempt to constrain the reach of the statute has another consequence of which Congress would disapprove; it only allows for regulation of creators of images who have a commercial relationship with those depicted. In the Adam Walsh Child Protection and Safety Act of 2006, one of the specific findings Congress made when amending § 2257 was that "[a] substantial interstate market in child pornography exists, including not only a multimillion dollar industry, but also a nationwide network of individuals [who] openly advertising their desire to exploit children and to traffic in child pornography. Many of these individuals distribute child pornography with the expectation of receiving other child pornography in return." Pub. L. No. 109-248, tit. V, § 501(1)(B), 120 Stat. 587, 623. These individuals in underground networks operating via the

Internet are unlikely to be paying the children depicted when they create images of them. Indeed, as we detailed when discussing the proper construction of this statute, there are innumerable situations where the individual is not acting with commercial motives, and is therefore unlikely to either be paying the children depicted or being paid to arrange for the participation of the children. *See supra* p.10-12 (providing examples of surreptitious creation of images as well as creation with the consent of a parent). While someone could rely on the term "managing" to cover individuals using unpaid performers, we do not believe there is a way to interpret "managing" to cover these noncommercially-motivated people, but not a married couple.

Finally, Congress's interest in aiding prosecutions for production and possession of child pornography would not be well-vindicated by the partial dissent's formulation. Congress wanted the provenance of all sexually explicit images of children. An important purpose of these records was to make it easier for prosecutors to prove that the image possessed by a defendant was in fact a child, an element that is required in every prosecution. Problems proving that the individual depicted is a child are encountered regardless of whether the individual depicted was in some way compensated.

We think that there are many ways Congress can modify this statute to alleviate First Amendment concerns while at the same time ensuring that the statute covers the vast majority of situations with which it is concerned. Doing so, however, requires greater creativity in formulating and a freer hand in rewriting than we have, a hand which is limited to severing phrases. This case is very similar to *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995). The Supreme Court there held that severing was not possible because the potential fixes were not themselves previously adjudicated nor clearly identified from the legislative history, and therefore the severed statute would present difficult constitutional questions that may not be presented if Congress was to draft the legislation. 513 U.S. at 478-79. Because we have no clear guidance from Congress and the constitutional rules are unclear, we do not believe we can use severing to save the statute's constitutionality while at the same time vindicating Congress's intent. *See id.* at 479 n.26 ("Drawing a line between a building and sidewalks with which we are intimately familiar, based on settled First Amendment principles, is a relatively simple matter. In contrast, drawing one or more lines between categories of speech covered by an overly broad statute, when Congress has sent inconsistent signals as to where the new line or lines should be drawn, involves a far more serious invasion of the legislative domain." (citation omitted)); *see also Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329-30 (2006) (unanimous) ("[M]aking distinctions in a murky constitutional context, or where line-drawing is inherently complex, may call for a 'far more serious invasion of the legislative domain' than we ought to undertake." (quoting *National Treasury Employees Union*, 513 U.S. at 479 n.26)). We therefore find the statute facially invalid.

III. The Fifth Amendment Challenge

The Doe plaintiffs allege that they fear that the identification information required by § 2257 will be used against them in obscenity prosecutions, and that the identification requirements thus violate the Fifth Amendment's right to avoid self-incrimination. Because we have determined that § 2257*s universal age-verification requirement runs afoul of the First Amendment, we need not and do not consider the plaintiffs' Fifth Amendment argument.

CONCLUSION

For the foregoing reasons, the district court's grant of summary judgment for the government is REVERSED, and the case is REMANDED to the district court with instructions to find 18 U.S.C. § 2257 unconstitutionally overbroad, and accordingly enter summary judgment for the plaintiffs.

CONCURRENCE

KAREN NELSON MOORE, Circuit Judge, concurring. The Plaintiffs-Appellants have brought both facial and as-applied challenges in this case. Plaintiffs-Appellants Br. at 32. The majority opinion decides the case on the grounds of facial overbreadth. Although I concur in the majority opinion, I write this opinion to make clear that 18 U.S.C. § 2257 would also be found unconstitutional under an as-applied challenge brought by the Plaintiffs-Appellants.

I. STANDING

To bring an as-applied challenge, the plaintiffs in this case need to show that they meet the requirements for both constitutional and prudential standing. Constitutional standing requires a plaintiff to show that he or she "has suffered (1) an injury that is (2) 'fairly traceable to the defendant's allegedly unlawful conduct' and that is (3) 'likely to be redressed by the requested relief.'" *Prime Media, Inc. v. City of Brentwood*, 485 F.3d 343, 349 (6th Cir. 2007) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Prudential standing requires a party to assert only its own rights rather than a "generalized grievance" or the rights of third parties. *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975), and *Valley Forge Christian Coll. v. Americans United for Separation of Church and State*, 454 U.S. 464, 475 (1982)). Connection and the publisher of its magazines have definitely asserted a "concrete and particularized" injury caused by § 2257: diminished advertising revenue and circulation. *Lujan*, 504 U.S. at 560. This injury, which relates to the specific rights of the plaintiffs, also meets the requirements for prudential standing. Lastly, Article III's case-or-controversy requirement is met when only one plaintiff establishes standing. *Mass. v. Envtl. Prot. Agency*, --- U.S. ---, 127 S.Ct. 1438, 1453 (2007). I therefore do not reach the question of whether the Doe plaintiffs, alone, would have standing.

II. ANALYSIS OF CONNECTION'S FIRST AMENDMENT CHALLENGES

A. Identifying the Applicable Level of Scrutiny

To determine which level of scrutiny applies, we begin by asking whether the speech restriction in question is content-based or content-neutral. The Supreme Court faced a similar speech restriction in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000). There, the plaintiffs challenged a provision of the Telecommunications Act of 1996 requiring cable operators providing "channels 'primarily dedicated to sexually-oriented programming' either to 'fully scramble or otherwise fully block' those channels or to limit their transmission to" the hours between 10 p.m. and 6 a.m. *Id.* at 806 (quoting 47 U.S.C. § 561(a) (1994 ed., Supp. III)). Because the statute "applie[d] only to channels primarily dedicated to 'sexually explicit adult programming or other programming that is indecent,'" the Supreme Court observed that it "'focuse[d] *only* on the content of the speech and the direct impact that speech has on its listeners.'" *Id.* at 811 (citations omitted). Accordingly, the Court held that such a restriction represented "the essence of content-based regulation," and thus the

Court applied strict scrutiny. *Id.* at 812-13.

Like the statute at issue in *Playboy Entertainment Group*, the Act involved here applies only to producers of certain types of content, namely, media containing "visual depictions . . . of actual sexually explicit conduct." 18 U.S.C. § 2257(a)(1). Under the Supreme Court's analysis in *Playboy Entertainment Group*, the Act's restrictions on speech are clearly content-based. However, the prior panel concluded, in *Connection I*, that the Act is content-neutral and, in *Connection II*, that this conclusion represented the law of the case. Although I believe that this conclusion is incorrect,[1] I recognize that it is the law of the case and that we are therefore bound by it. Accordingly, I apply intermediate scrutiny—the level applicable to content-neutral speech regulations—to the Act. *Norton v.*

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[1] I note that in *American Library Association v. Reno*, 33 F.3d 78, 87 (D.C. Cir. 1994), the U.S. Court of Appeals for the D.C. Circuit also concluded that § 2257 is content-neutral. I find this analysis unconvincing. The D.C. Circuit focused on Congress's ultimate intent to deter child pornography by passing § 2257. *Id.* at 86. Focusing on Congress's intentions, however, misses the mark because Congress chose to further its intent via an explicitly content-based speech restriction. If the D.C. Circuit's logic were correct, the Supreme Court would have considered the restriction in *Playboy Entertainment Group* content-neutral because it was aimed not at suppressing the speech in question, but rather at preventing minors' unsupervised access to it. Indeed, Justice Kennedy noted, in the controlling opinion in *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002), that "whether a statute is content neutral or content based is something that can be determined on the face of it; *if the statute describes speech by content then it is content based*." *Id.* at 448 (emphasis added). Accordingly, I believe that the D.C. Circuit erred by focusing on Congress's ultimate goal, rather than the means selected to advance it, in determining whether the regulation in question is content-based.

Ashcroft, 298 F.3d 547, 553 (6th Cir. 2002); *cf. City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 440 (2002) (plurality opinion) ("municipal ordinances receive only intermediate scrutiny if they are content neutral").

B. Applying Intermediate Scrutiny

Under intermediate scrutiny, we must uphold a challenged regulation of speech so long as it is narrowly tailored to serve a significant government interest and leaves open ample alternative channels of communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The government bears the burden of proving each part of this test. *Playboy Entm't*, 529 U.S. at 816 ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." (citing *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 183 (1999))).

All agree that preventing the sexual exploitation of minors in child pornography is a significant (indeed, a compelling) government interest. The main thrust of the parties' dispute is over whether the Act's *universal* age-verification requirement is narrowly tailored to this interest.

When courts apply intermediate scrutiny, "the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Ward*, 491 U.S. at 799 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985) (alteration in original)). While the regulation need not be the least restrictive means of promoting the government's asserted interest,[2] *id.* at 798-800, it may not "burden substantially more speech than is necessary to further the government's legitimate interests," *id.* at 799. In other words, if the government "regulate[s] expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals," the regulation is not narrowly tailored. *Id.*

I conclude that the government has failed to establish that the Act does not burden substantially more speech than is necessary to further the government's interest in preventing the sexual exploitation of minors. The alarming breadth of speech burdened by the Act compels this conclusion, especially when compared to the breadth of regulations that directly advance the government's interest in preventing the sexual exploitation of minors in child pornography.

Congress's ultimate goal in passing the Act (as related by the government) was to prevent the sexual exploitation of minors in child pornography. Elsewhere, Congress has chosen to advance these ends directly by passing a flat ban on the production of child pornography. *See* 18 U.S.C. § 2251. It has also chosen to advance these means indirectly by prohibiting the distribution, receipt, and possession of child pornography. *See id.* § 2252; *see also New York v. Ferber*, 458 U.S. 747, 765 (1982) (upholding a similar state statute); *Osborne v. Ohio*, 495 U.S. 103 (1990) (same). These indirect regulations advance the goal of preventing the sexual exploitation of children by destroying the market for materials depicting such activity. *See Osborne*, 495 U.S. at 109. In both the direct and indirect regulations, Congress has chosen to advance its interest in preventing the exploitation of minors by regulating materials depicting the exploitation of minors.

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[2] This represents a distinction between the meaning of "narrow tailoring" in the context of strict scrutiny and intermediate scrutiny. Under strict scrutiny, a regulation is not narrowly tailored unless it represents the least restrictive means of achieving the government's (compelling) interest. Under intermediate scrutiny, however, the regulation need not be the least restrictive alternative to be constitutional.

The regulation at issue in this case, § 2257,[3] does not apply only to child pornography. It applies to a class of materials much broader than those depicting what Congress ultimately seeks to prevent, and therefore does not seek to advance Congress's ultimate goal directly, or even as directly as § 2252's prohibitions on distribution, receipt, and possession of child pornography. Instead, Congress seeks to supplement these existing bans by imposing age-verification and record-keeping requirements on *all* visual depictions of actual sexually explicit activity, regardless of the age of the performers. In this regard, the means employed by § 2257 are distinguishable from, and significantly broader than, those employed by §§ 2251 and 2252.

According to the D.C. Circuit, § 2257 advances the interest of preventing the sexual exploitation of minors in three ways. First, it ensures that pornographers will know how old their subjects are and thus prevents producers of pornography from unknowingly exploiting minors. Second, it prevents child pornographers from gaining access to commercial markets by requiring secondary producers to obtain age-verifying documentation from primary producers. If a primary producer fails to provide the necessary information, the secondary producer will not publish the primary producer's materials. Third, it aids enforcement of §§ 2251 and 2252: if a law enforcement officer is uncertain whether a particular depiction of actual sexually explicit conduct contains a minor, he or she will be able to identify the performers and their respective ages. *Am. Library Ass'n v. Reno*, 33 F.3d 78, 86 (D.C. Cir. 1994). Thus, § 2257 does not regulate child pornography directly but is part of a larger regulatory scheme designed to stamp out the production of, and demand for, materials depicting the sexual exploitation of minors. In other words, § 2257 regulates a broad category of protected speech[4] to aid enforcement of a ban on unprotected speech.

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[3] In the interest of brevity, I refer to the universal age-verification and record-keeping requirements enforced under § 2257 and its applicable regulations as "§ 2257."

The key question is whether the means employed in § 2257—imposing age-verification and record-keeping requirements on *all* who produce depictions of actual sexually explicit conduct, regardless of the performers' ages—burdens substantially more speech than necessary to prevent the sexual exploitation of minors in child pornography. Again, it is notable that § 2257 applies broadly to a category of speech, and that the vast majority of this category (specifically, all that is not obscene and does not involve minors) receives First Amendment protection. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994) ("nonobscene, sexually explicit materials involving persons over the age of 17 are protected by the First Amendment.").

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[4] It is debatable whether the target of § 2257 may better be described as "expressive activity," or as "speech." Because § 2257 regulates *visual representations* of particular activity (depictions of actual sexually explicit conduct), rather than the activity itself (actual sexually explicit conduct), I believe § 2257's immediate target is better described as speech.

The evidence in the record indicates that the vast majority of swingers are middle-aged and accordingly not at risk of being mistaken for minors. Relatedly, the record contains no indication of swingers engaging in sexual exploitation of minors. Accordingly, in the vast majority of instances, applying § 2257's age-verification and record-keeping requirements to this population does not advance the government's interest in preventing child pornography, but instead operates to burden constitutionally protected speech without any corresponding benefit. Indeed, this is true of all visual depictions of actual sexually explicit activity involving performers who are clearly above the age of majority. Accordingly, a substantial portion of the burden on speech does not serve to advance the government's asserted goal, so § 2257 is not narrowly tailored to the government's interest in preventing the sexual exploitation of minors in child pornography.

The Supreme Court's opinion in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), bolsters this conclusion. There, the Court struck down a statute "extend[ing] the federal prohibition against child pornography to sexually explicit images that appear to depict minors but were produced without using any real children." *Id.* at 239. Key to the Court's conclusion was the fact that the speech at issue "record[ed] no crime and create[d] no victims by its production" and consequently was protected speech. *Id.* at 250. The government nonetheless sought to justify its ban on this protected speech as a means to ban unprotected speech. The Supreme Court noted that such an "analysis turns the First Amendment upside down." *Id.* at 255. I agree. In the majority of instances, § 2257, like the statute at issue in *Free Speech Coalition*, burdens speech that is neither criminal nor unprotected as a means of banning unprotected speech (namely, child pornography). Like the Supreme Court, I conclude that such a regulatory regime is not narrowly drawn, and accordingly would hold that § 2257's universal age-verification requirement is not narrowly tailored to the goal of curbing child pornography.[5]

To illustrate this point, Connection proposes a more-narrowly tailored regulation, modeling its proposal on the regime governing tobacco sales. According to Connection, store clerks are required to ask for identification whenever someone who appears under the age of twenty-six attempts to purchase tobacco products, even though it is legal to purchase such products upon turning eighteen. This regulatory scheme is designed to ensure that people who fall into the age range where they may or may not look old enough to buy tobacco are identified, while people who are clearly of-age are not inconvenienced. I note that the availability of a better tailored regulation does not, by itself, demonstrate that the regulation at issue fails the narrow tailoring test, as intermediate scrutiny does not require that the regulation be the least restrictive means of achieving the government's interest. The point here is that alternatives exist that will burden substantially less protected speech, yet advance the government's asserted interest equally well. And this point illustrates precisely why § 2257 is not narrowly tailored.

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[5] *Free Speech Coalition*, of course, is distinguishable in that it banned certain protected speech, while § 2257 merely burdens the speech. This distinction, however, is not dispositive. As noted above, the evidence in this case demonstrates that § 2257 places a substantial chill on certain types of expressive conduct and thus has an effect very similar to that of a flat ban.

This is not to suggest that Congress must employ an analogous regulatory scheme, but rather to illustrate that it is possible to pursue an interest in identifying minors without burdening those who *clearly* are not minors. Additionally, a regulation similar to Connection's proposal appears to tack more closely to Congress's actual goal in passing § 2257. As the D.C. Circuit noted, "The 1988 Act was passed by Congress on the recommendation of the Attorney General's Commission on Pornography." *Am. Library Ass'n*, 33 F.3d at 81. More specifically, the Commission's Recommendation 37 suggested that Congress "enact a statute requiring the producers, retailers or distributors of sexually explicit visual depictions to maintain records containing consent forms and proof of performers' ages." 1 Attorney General's Comm'n on Pornography, Final Report 618 (1986). The Commission recommended such legislation to deal with "pseudo child pornography," which "involve[s] women allegedly over the age of eighteen who are presented in such a way as to make them appear to be children or youths." *Id.* at 618 n.459 (internal quotation marks and citation omitted). According to the Commission, pseudo child pornography created special concerns because it was difficult and sometimes impossible for law-enforcement officials to discern whether the performers were above the age of eighteen or actually *were* minors. The Commission recommended imposing age-verification and record-keeping requirements as a means to ensure that no minors were being exploited in actual child pornography that was passed off as pseudo child pornography. *Id.* at 620. A regulation modeled along the lines that Connection suggests would achieve this goal. Consequently, it is difficult to see why a *universal* age-verification requirement is necessary.

The government objects to Connection's proposal, arguing that some of the pictures submitted do not reveal the performers' faces, which will render extremely difficult the determination of whether the performers depicted appear to be older than twenty-six, or whatever other cut-off age might attach.[6] The government also argues that it is easier to discern a person's age in a face-to-face interaction than in a photograph or video.[7] These arguments, however, are not aimed at the ultimate constitutionality of a universal age-verification requirement. Instead, they are arguments better addressed to a legislature attempting to draft a statute that would survive constitutional muster. It is not our place judicially to revise § 2257 or to tell Congress how to do so. Instead, I merely reiterate that § 2257 burdens substantially more protected speech than is necessary to advance Congress's compelling interest in preventing the sexual exploitation of minors. Accordingly, § 2257 is not narrowly tailored and is, therefore, unconstitutional as applied to the Plaintiffs-Appellants.[8]

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[6] At oral argument, counsel for Connection suggested that Connection would accept a regime that required performers in sexually explicit depictions who appeared to be under the age of thirty to submit age-identification documents.

[7] The government might also object by arguing that its interest in preventing the sexual exploitation of minors is greater than its interest in preventing teen tobacco use. Such an argument would cut both ways because Connection's readers/advertisers have an even more compelling basis to avoid submitting identifying information than do tobacco purchasers. Rather than merely engaging in a commercial transaction (such as buying cigarettes) that receives no constitutional protection, Connection's patrons seek to engage in *protected speech*. In other contexts, the Supreme Court has highlighted the interest in speaking anonymously. *See, e.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) (striking down a ban on anonymous

III. CONCLUSION

I remain disgusted by child pornography and the sexual exploitation of children that it depicts and generates, and I remain convinced that protection of children is a government interest of the highest order. Nonetheless, under the applicable precedent, the means that Congress chooses to advance this end must not burden substantially more speech than necessary. For the reasons stated in this opinion, I would conclude that § 2257 is unconstitutional as applied to the Plaintiffs- Appellants. Moreover, I agree with the majority that § 2257 is facially unconstitutional for overbreadth.

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pamphleteering). Thus, in this case, *both* parties' interests run higher than in the case of tobacco sales.

[8] Because I conclude that § 2257 is not narrowly tailored, I need not address whether it leaves open ample alternative channels of communication. *Parks v. Finan*, 385 F.3d 694, 705-06 (6th Cir. 2004).

CONCURRING IN PART, DISSENTING IN PART

McKEAGUE, Circuit Judge, concurring in part and dissenting in part. I agree with much of the majority's thoughtful opinion. In short, § 2257 is overbroad in its current form. I depart from the majority, however, on the standard we should employ to measure § 2257's breadth and on whether portions of the section can be judicially salvaged. Accordingly, I concur in part and dissent in part.

I

My initial point of departure from the majority is with its rejection of the standard for measuring whether a provision like § 2257 is overbroad as set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), and *New York v. Ferber*, 458 U.S. 747 (1982). Maj. op. at 8-9. Section 2257 does not regulate "pure" speech, but rather something closer to the "conduct plus speech" described by the Supreme Court in *Ferber*, 458 U.S. at 771 (discussing *Broadrick*, 413 U.S. at 615). Like regulations covering "picketing and participating in election campaigns," activities which involve both conduct and speech, *id.* at 772, § 2257 on its face concerns itself with the visual depiction (speech) of a specific type of conduct, "actual sexually explicit conduct." It is also clear that the government was not concerned about all "actual sexually explicit conduct," but rather a subset of such conduct—the involvement of adolescents in the pornography industry—and the

secondary effects that conduct could have on child pornography in general. *See, e.g.*, Congressional Testimony of H. Robert Showers, Criminal Division, U.S.
Department of Justice at 8-9, JA 120-21; Statement of Alan E. Sears, Legal Counsel for Citizens for Decency through Law, Inc. at 18-21, JA 233-35; *see also Am. Library Ass'n v. Reno*, 33 F.3d 78, 85-86 (D.C. Cir. 1994) (discussing findings and recommendations of the Attorney General's Commission on Pornography). For the reasons more fully set forth by the D.C. Circuit in *American Library Association v. Reno*, I would find that: (a) § 2257 regulates aspects of both speech and conduct; and (b) the government had legitimate concerns unrelated to speech in enacting the provision. 33 F.3d at 84-88. Accordingly, I would require that the "overbreadth of [§ 2257] must not only be real, but substantial as well," *Broadrick*, 413 U.S. at 615, and measure it against the standard set forth in *O'Brien*, 391 U.S. at 376. The government should have more room to regulate here than the majority gives it.

II

With that said, I agree with the majority that the plain language of the text encompasses expression and conduct far outside the line sufficient to protect minors. Section 2257(a) requires that *all* producers of "visual depictions . . . of actual sexually explicit conduct" create and maintain certain records. As the majority aptly explains, the broad scope of producers defined in § 2257(h) conceivably encompasses adult couples who film or photograph themselves engaging in "actual sexually explicit conduct" or what in an earlier age was more euphemistically known as "marital relations." Excepting the emotional scars that might inure to the couple's child who stumbles across this material, there is little reason to believe that these visual depictions could harm children or contribute in any way to the creation and distribution of child pornography. Thus, I agree with the majority that § 2257 is substantially more broad than necessary to achieve the legitimate ends identified by the government.

Most of § 2257 can, however, be salvaged. As the Supreme Court directed in *Ferber*, a court must not invalidate an entire statute on overbreadth grounds if the statute is severable, in which case only the unconstitutional portion must be invalidated. 458 U.S. at 769 n.24 (citing *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363 (1971)); *see also Broadrick*, 413 U.S. at 613 (explaining that "any enforcement of [the ordinance] is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression"). Doing so avoids the dramatic result and "strong medicine" of invalidating the entire statutory scheme. *Ferber*, 458 U.S. at 769.

The broad reach of § 2257 is a function of its definition of "produce." Section 2257(h) provides in relevant part:

> (2) the term "produces"–
>
> (A) means–
>
> (i) actually filming, videotaping, photographing, creating a picture, digital image, or digitally- or computer-manipulated image of an actual human

being;

(ii) digitizing an image, of a visual depiction of sexually explicit conduct; or, assembling, manufacturing, publishing, duplicating, reproducing, or reissuing a book, magazine, periodical, film, videotape, digital image, or picture, or other matter intended for commercial distribution, that contains a visual depiction of sexually explicit conduct; . . .

* * *

(B) does not include activities that are limited to–

(i) photo or film processing, including digitization of previously existing visual depictions, as part of a commercial enterprise, with no other commercial interest in the sexually explicit material, printing, and video duplication;

(ii) distribution;

(iii) any activity, other than those activities identified in subparagraph (A), that does not involve the hiring, contracting for, managing, or otherwise arranging for the participation of the depicted performers;

* * *

Subparagraph (A) sweeps into its reach the typical producers of commercial pornography—photographers, directors, publishers, etc.—but also the unsuspecting adult couple identified by the majority who otherwise has no connection with the industry. In its present form, part (iii) of subparagraph (B) does not except the couple out of the definition because (a) it expressly excludes from the exception those persons who "actually" film or take the visual depiction, and (b) it could be said that one of the participants likely "arrang[ed] for the participation" of the other. Part (iii) can be modified, however, to except people like our couple if it is written as follows:

> (iii) any activity~~, other than those activities identified in subparagraph (A),~~ that does not involve the hiring, contracting for~~, [or] managing, or otherwise arranging for~~ the participation of the depicted performers;

Under this construction, the typical industry players would still qualify as producers to the extent that they hire, contract for, or manage the performers. Even those who coerce or physically force someone to perform in a pornographic film, for instance, would still be covered as they likely would receive some consideration for their illicit efforts, and thereby could be said to have contracted for or managed the performer. Who would now fall outside the definition, however, is the member of our paradigmatic couple who it cannot be said either hired, contracted for, or managed in a commercial sense the other member.

The question remains whether Congress would still have passed § 2257 "'had it known' that the remaining 'provision[s were] invalid'?" *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 767 (1996) (plurality) (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 506 (1985)). If so, the court need not invalidate all of § 2257 as overbroad. *Id.* (citing *Ferber*, 458 U.S. at 769).

Section 2257 does not contain an express severability clause; however, the history and purpose of the statute evidence a "'severability' intention" upon which this court could rely. *Id.* (internal quotation marks in original). The "other than those activities" language of § 2257(h)(2)(B)(iii) was not in the original version of the Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, Title VII, § 7513 (the "Act"); Congress added the language in 2006 as part of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248 (the "Adam Walsh Act"), § 502, partially in response to the Tenth Circuit's decision in *Sundance Associates, Inc. v. Reno*, 139 F.3d 804 (10th Cir. 1998) (striking down Department of Justice regulations similar to the provisions in the amended § 2257).[1] Thus, for most of the period when the statute has been in force, part of the language to be stricken was not included.

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[1] The majority points out that Congress made findings in the Adam Walsh Act regarding the electronic exchange of child pornography. Maj. op. at 16. The findings cited by the majority mirror similar comments made to Congress in the 1980s. *See, e.g.*, Final Report at 345, JA 271 ("Investigators have discovered that pedophile offenders use personal computer communications to establish contacts and as sources for the exchange or sale of child pornography."). At that time Congress passed other provisions directly addressing the problem, including adding "computer" to the prohibited means of exchanging child pornography. *See, e.g.*, Act § 7511. The Adam Walsh Act amended not only the recordkeeping provisions of § 2257, but also a host of other provisions, some dealing explicitly with child pornography and

More importantly, it is clear that Congress's main purpose with respect to the recordkeeping provisions was to protect adolescents whose ages could not be discerned simply by viewing the visual depiction. In its final report submitted to Congress, the Attorney General's Commission on Pornography found that commercial producers "are looking for models that look as young as possible. They may use an eighteen-year-old model and dress her up to look like she is 15." Final Report at 229-30, JA 249. The more immediate danger, of course, is that a producer will use an *actual* fifteen-year-old and then claim that he or she did not know that the performer was underage. As the Commission explained,

> Despite the umbrella protection provided by the Child Protection Act of 1984, loopholes remain that permit the continued exploitation of children. For example, experts and law enforcement officers have found it difficult to extend this protection because in many instances, ascertaining the real ages of adolescent performers is impossible. By viewing a visual depiction, how does one decide if the performer is fourteen or eighteen, seventeen or twenty-one?

Final Report at 139, JA 273. The example cited most

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exploitation. Thus, I do not find that the congressional finding in 2006 relied upon by the majority adds any support to the thesis that Congress would prefer that the entire recordkeeping provision be stricken.

often by proponents of the recordkeeping provisions was that of "adult" star Traci Lords who began making hardcore pornographic films at age fifteen. *See, e.g.*, Statement of Sears at 18-19, JA 233-34 (citing the criminal case against the producers of Traci Lords's films, *United States v. Kantor*, 677 F. Supp. 1421 (C.D. Cal. 1987)); Testimony of Showers at 8-9, JA 120-21 (discussing need for recordkeeping provisions in light of the DOJ's then-current prosecution of Traci Lords's producers); Response of Showers to Question by Senator Grassley at 20-21, JA 146 ("Proof that an older-looking adolescent engaging in sexually explicit conduct is actually less than 18 at the time of filming is often impossible."). Because of this problem, the Commission recommended the enactment of age-related recordkeeping provisions, which Congress did in the form of § 2257. Final Report at 138, JA 273.

As noted (but discounted) by the majority, the text of § 2257 and its implementing regulations refer on their face to commercial enterprises. *See* Maj. op. at 5-7 & n.2 (including references to "business premises," "normal business hours," and "commercial distribution"). While other portions of the Act encompass both commercial and noncommercial pornography, the recordkeeping provisions are primarily targeted at the commercial pornography industry. *See, e.g.*, Final Report at 139, JA 273 ("The recordkeeping obligation should be imposed on wholesalers, retailers, distributors, producers and anyone engaged in the sale or trade of sexually explicit material as described in the Child Protection Act."); Response of Showers to Question by Senator Humphrey at 13-15, JA 157 (discussion and rejection of a "commercial purpose limitation" was in reference to § 201 of the Act (dealing with the receipt or possession of obscene matter) and not § 103 (the recordkeeping provisions)); Response of Brent D. Ward, U.S. Attorney, to Question by Senator Hatch at 44-45, JA 157 (explaining that provisions that would aid against "underground child pornography" included § 101 and § 104 of the Act; no mention of § 103); Summary of ACLU Testimony at 2, JA 185 (noting that § 103 would "force all magazine publishers and filmmakers who depict actual sexual activity to keep complex records regarding models"); Statement of Sears at 19, JA 234 (opining that recordkeeping provisions apply only to those who "employ performers"). Because severing the portions of part (iii) indicated above would still capture most, if not all, of the commercial pornography industry within the definition of "produce," § 2257 would continue to combat against adolescent actors being used in the industry. There is no reason to believe that Congress would have preferred no recordkeeping provisions to the scaled-back version described above. Thus, I would hold that the invalid provisions are severable from the rest of § 2257. *Denver Area Consurtium*, 518 U.S. at 768.

The majority responds that under my proposition, "no publisher, commercial or otherwise, would be covered by the statute. Instead, only those who create the depiction and pay the depicted individuals would have to keep records." Maj. op. at 15. It is hard to follow the majority's reasoning here. The definition of "produces" includes "publishing," 18 U.S.C. § 2257(h)(2)(A)(ii), which my suggested severing does not directly affect. Only if the publisher cannot, in any way, be said to have hired, contracted for, or managed the depicted performers would he fall outside the severed definition of "produces." Yet, such a publisher would not be off the hook under the recordkeeping provisions of § 2257. Under the relevant portion of subsection (f), "It shall be unlawful–"

* * *

> (4) **for any person knowingly to sell or otherwise transfer, or offer for sale or transfer**, any book, magazine, periodical, film, video, or other matter, produce in whole or in part with materials which have been mailed or shipped in interstate or foreign commerce or which is intended for shipment in interstate or foreign commerce, which–
>
> > (A) contains one or more visual depictions made after the effective date of this subsection of actual sexually explicit conduct; and
> >
> > (B) is produced in whole or in part with materials which have been mailed or shipped in interstate or foreign commerce, or is shipped or transported or is intended for shipment or transportation in interstate or foreign commerce;
>
> which does not have affixed thereto, in a manner prescribed as set forth in subsection (e)(1), a statement describing where the records required by this section may be located, but such person shall have no duty to determined the accuracy of the contents of the statement or the records required to be kept . . . .

(Emphasis added). Thus, even the publisher who is not otherwise a producer would still be compelled to describe in detail where the proper records are maintained.[2] Moreover, to the extent that this publisher is able to so distance himself from the production of the visual images that he would fall outside the severed definition, he would have likely fallen outside of the nonsevered provision of "otherwise arranging for" as well. Thus, severing the unconstitutional portion of § 2257(h)(2)(B)(iii) would not permit a flood of pornography publishers to slip through any cracks of § 2257 that were not there in the first place.

Finally, as to the majority's reliance on the Supreme Court's decision in *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995), the reliance is misplaced. That case was brought by employees of the Executive Branch who challenged the constitutionality of the provision of the Ethics Reform Act of 1989 dealing with honoraria. In an attempt to salvage the provision, the court of appeals had not simply been able to sever the unconstitutional portion from the rest of the act, but actually had to add a provision: ". . . we think it a proper form of severance to strike 'officer or employee' from § 501(b) *except* in so far as those terms encompass members of Congress, officers and employees of Congress, judicial officers and judicial employees." *Id.* at 478 n.24 (quoting lower court decision) (emphasis in original). The government had requested that the Supreme Court craft a different provision, a nexus requirement for the honoraria ban. The Supreme Court rejected both the circuit court's and the government's invitations to craft new provisions, leaving that task to Congress instead. *Id.* at 479. Here, in contrast, we could sever the unconstitutional provision with minimal impact on the rest of the recordkeeping provisions and without having to draft new language.

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[2] The Tenth Circuit's 1998 decision in *Sundance Associates*, to which Congress passed portions of the Adam Walsh Act in response, did not address subsection (f), but rather only subsection (h). 139 F.3d at 808-11.

III

Consequently, I would find that § 2257, severed as described above, is not overbroad because its reach into protected noncommercial speech would not be so substantial as to render it unconstitutional under *Ferber*. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496-97 (1982) ("[I]t is irrelevant whether the ordinance has an overbroad scope encompassing protected commercial speech of other persons, because the overbreadth doctrine does not apply to commercial speech."). I would likewise reject the remaining First Amendment and Fifth Amendment claims made by the plaintiffs, and would therefore affirm the district court's grant of summary judgment to the government.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CONNECTION)CASE NO. 1:95CV1993
DISTRIBUTING CO., et al.,)
)
Plaintiffs,)
vs.) Judge John M. Manos
)
ALBERT0 GONZALEZ,)
)
Defendant.) MEMORANDUM OF
) OPINION

On September 13, 1995, Plaintiff Connection Distributing Co. filed this action against the Attorney General of the United States seeking declaratory and injunctive relief to prohibit enforcement of the Child Protection Restoration and Penalties Enhancement Act of 1990, codified at 18 U.S.C. § 2257. On May 25,2000, the Court Granted summary judgment in favor of the Defendant that the statute is constitutional.

On September 24, 2002, the Sixth Circuit remanded the action for reconsideration in view of recent Supreme Court decisions rendered subsequent to this Court's ruling, including: (1) Watchtower Bible & Tract Society of N.Y., Inc. v. Village of Stratton, 536 U.S. 150 (2002); (2) City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002); (3) Ashcroft v. Free Speech Coalition, 535 US. 234 (2002); and (4) United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000). The Sixth Circuit also concluded that this Court correctly applied intermediate scrutiny in analyzing the validity of the statute.

Following the remand, the Court set a discovery and briefing schedule on the constitutionality of the statute. On August 20,2003, the Plaintiffs filed an Amended Complaint based on intervening amendments to the statute. On September 2, 2003, the Defendant filed a motion for summary judgment as to the Amended Complaint (Docket No. 105), and on November 5,2003, the Plaintiffs filed their own motion for a preliminary injunction to preclude enforcement of the amended statute (Docket No. 108).

Subsequently, the Department of Justice issued new regulations, to be effective on June 23,2005, to implement the statute. On June 16,2005, the Plaintiffs filed a motion for a temporary restraining order to preclude enforcement of the new regulations, which, by agreement of the parties and the Court. was converted into a motion for a preliminary injunction (Docket No. 11 8). On August 26,2005, the Court held a preliminary injunction hearing. The parties have fully briefed the issues.

For the following reasons, the Plaintiffs' motions for preliminary injunction are DENIED, and the Defendant's motion for summary judgment is GRANTED.

I. FACTS

On September 13, 1995, the Plaintiff filed this action seeking declaratory and injunctive relief to prohibit enforcement of the Child Protection Restoration and Penalties Enhancement Act of 1990, codified at 18 U.S.C. § 2257. The statute requires producers of materials containing visual depictions of "actually sexually explicit conduct", as defined therein, to create and maintain records concerning the identity and age of all performers depicted. 18 U.S.C. §§ 2257(a) and (h)(1).

Producers must ascertain and record each performer's name (including any professional name, nickname, or alias used by such person) and date of birth. 18 U.S.C. § 2257(b). In addition, a legible copy of an identification document (*e.g.*,d river's license, passport, or state identification card) must be kept verifying the personal information of each performer. 28 C.F.R. § 75.2(a)(1). Producers also must maintain these records at their business premises and are required to make them available to the Attorney General for inspection at all reasonable times. 18 U.S.C. § 2257(c). Furthermore, each book, magazine, periodical, film or videotape covered by the statute must contain a conspicuous statement of the address at which the records are kept. 18 U.S.C. § 2257(e). Any producer who does not comply with the statute is subject to criminal penalties. 18 U.S.C. § 2257(I).

Plaintiff Connection Distributing is a Cleveland corporation that publishes sexually explicit "swinger" magazines. According to Patricia Prementine, Editor of Connection Distributing and a self-proclaimed swinger, "swinging" is "an alternative social and sexual lifestyle comprised mostly of mature adults who believe in sexual freedom and do not believe in sexual monogamy. [Swingers] allow their partners the freedom to experience sexual relationships with others." (1996 Transcript at 4.)[3]

The Plaintiffs' magazines consist, *inter alia*, of advertisements placed by individuals seeking to meet others in the swinging lifestyle. The ads, which generally contain the author's biographical information, personal facts, and an identification number, are often accompanied by one or more sexually explicit photographs. Individuals who wish to respond to ail ad may submit a letter to the Plaintiff which, for a handling fee, will forward the correspondence to the person who placed the ad. In this fashion, the identity of the one who placed the ad remains confidential.

Counts 1 through 4 of the Amended Complaint are essentially drawn from the original Complaint. In these counts, the Plaintiffs assert that the records requirements of the statute violate their First Amendment rights because they restrain and chill speech and expressive activity, and restrict the right to free association. The Plaintiffs allege that people will simply refrain from expressing themselves through the magazines rather than provide the identifying information required by the statute.

On August 20, 2003. with the Court's permission, the Plaintiffs filed their Amended Complaint adding Counts 5 through 7 asserting violations of the Fifth Amendment, The Court permitted the amendment based upon all intervening statutory change to 18 U.S.C. § 2257(d)(2). As originally drafted, this section provided that evidence obtained from the records could be used only for prosecutions of violations of "this section". In other words, the records could only be used in prosecutions for violations of the records requirements themselves. During Congressional hearings, this limitation on use of the records was touted as one way by which the records provisions were narrowly tailored to achieving the government's interest of protecting children. The Court also relied on this limitation as one basis for concluding that the statute is narrowly tailored. (Court's Memorandum of Opinion ,dated May 25,2000, at 9-10.)

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[3] References to the "1996 Transcript" are to the Transcript from the initial preliminary injunction hearing held on April 8 and 9. 1996.

On April 30,2003, Congress amended section 2257(d)(2) to permit evidence from the records to be used in prosecutions of violations of "this chapter or chapter 71". By this change, though small in words, the permissible use of the records has been expanded greatly. Now, the records can be used broadly in criminal prosecutions for obscenity and child pornography. In Counts 5 through 7, the Plaintiffs assert that the record keeping and use provisions, as amended, violate their Fifth Amendment rights, particularly the right against self-incrimination.

On June 23, 2005, new regulations became effective that implement the statutory records requirements. In particular, the definitions of primary and secondary producers of sexually explicit materials were expanded to include those who create and publish digital and computer generated images. 28 CFR § 75.1(c)(1) and (2). By their terms, these regulations expand the application of 18 U.S.C. § 2257 to depictions on the Internet. The regulations, however, contain exemptions for providers of web-hosting services and remote computing services who do not, and reasonably cannot, manage the sexually explicit content, 28 CFR § 75.1(c)(4)(iv) and (v).

The Plaintiffs maintain an online service that allows its members to contact one another. The service contains thousands of member profiles, each of which can contain up to one hundred photographs. Members post their own profiles and can change the content whenever they want, and often do. Many of the photographs are sexually explicit. Importantly, with respect to the online service, the Plaintiffs are essentially a web host. Content of the member profiles is posted and controlled by the members themselves without the Plaintiffs' involvement. The Plaintiffs, therefore, have no control over content. The online service also includes "chat rooms" by which members can converse over the Internet, as well as see each other using web cams. The Plaintiffs likewise have no control over the content provided by members to each other via the chat rooms. (Transcript of Hearing, August 26,2005 at 16-22.)

In addition, the new regulations define what constitutes "inspection at all reasonable times" pursuant to 18 U.S.C. § 2257(c). In particular, inspectors are "authorized to enter without delay" and without notice during business hours. A random inspection can be made once during any four-month period. and additional inspections can be performed if there is a reasonable suspicion that violations have occurred. In addition, inspectors may copy any records, and a law enforcement officer can seize any evidence of a commission of a felony found during an inspection. See 28 CFR § 75.5.

On June 16, 2005, the Plaintiffs filed a motion for a temporary restraining order to preclude enforcement and application of the new regulations. On August 26,2005, by agreement of the parties and the Court, this motion was converted into a motion for a preliminary injunction. On that day, the Court held a preliminary injunction hearing limited to evidence regarding the effects of the new regulations.

II. LAW

The Defendants seeks summary judgment that the statute and regulations are constitutional as a matter of law. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavit, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

The party moving for summary judgment bears the initial burden of production under Rule 56. The burden may be satisfied by presenting affirmative evidence that negates an element of the non-movant's claim or by demonstrating "an absence of evidence to support the non-moving party's case." Celotex Cora. v. Catrett, 477 U.S. 317, 325 (1986).

If the movant meets this burden, the non-movant must "set forth the specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The substantive law identifies which specific facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). To avoid summary judgment, the non-movant must "make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322.

"The evidence of the non-movant is to be believed, and all justifiable inferelices are to be drawn in his favor." Anderson, 477 U.S. at 256 (citing Adicltes v. Kress & Co., 398 U.S. 144, 158-59 (1970)). However, the non-movant must "do more tliaii simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corn., 475 U.S. 574, 586 (1986). "[T]he mere existence of some alleged factual disputes between the parties will not defeat an otherwise properly supported motion" for summary judgment. Anderson, 477 U.S. at 247-48.

In response to the Defendant's motion, the Plaintiff seek a preliminary injunction against enforcement of the statute and regulations. Injunctive relief is available if there would be no adequate remedy at law. Reese v. City of Columbus, 71 F.3d 619, 622 n. 2 (6th Cir. 1995), cert. denied, 117 S. Ct. 386 (1996). The purpose of a preliminary injunction is to preserve the relative positions of the parties until a trial on the merits call be held. Six Clinics Holding Corn., II. v. Cafcomp Systems. Inc., 119 F.3d 393,400 (6th Cir. 1997).

A Court considers the following four factors when determining whether to grant a preliminary injunction: (1) the likelihood of success on the merits by the party seeking the injunction; (2) whether the party seeking the injunction will suffer irreparable harm for which there is no adequate remedy at law if the injunction does not issue; (3) the probability of harm to others if the injunction is granted; and (4) the public interest in the grant or denial of the injunction.

McPherson v. Michigan High School Athletic Association, Inc., 119 F.3d 453, 459 (6th Cir. 1997); Six Clinics, 119 F.3d at 399; Golden v. Kelsey-Hayes Co., 73 F.3d 648,653 (6th Cir.), cert. denied, 519 U.S. 807 (1996). The factors are not prerequisites, but are to be balanced to determine whether the equities warrant issuing the preliminary injunction. McPherson, 119 F.3d at 459; Six Clinics, 119 F.3d at 400; Golden, 73 F.3d at 654.

The Sixth Circuit affirmed this Court's decision that the statute is to be analyzed under intermediate scrutiny principles. Under intermediate scrutiny, a statute or regulation is constitutional under the First Amendment if its obligations are narrowly tailored to further a significant governmental interest, and leaves open alternative channels for communication. Connection Distributing Co. v. Reno, 154 F.3d 281, 291 (6th Cir. 1998), citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). A statute is narrowly tailored if it promotes a substantial governmental interest that would be achieved less effectively absent the statute. Turner Broadcasting System. Inc. v. F.C.C., 512 U.S. 622, 662 (1994), citing, Ward, 491 U.S. at 799.

III. ANALYSIS

A. The Sixth Circuit's Remand

Counts 1 through 4 are essentially drawn from the original Complaint and assert that the statute at issue violates the Plaintiffs' First Amendment rights to free speech, expression, and association. Although the Court has permitted broad discovery and briefing on the validity of the statute under the First Amendment, the actual remand order of the Sixth Circuit is narrow.

This Court has been instructed to reconsider its previous ruling in light of recent Supreme Court precedent, including without limitation the four cases identified in the remand order. Accordingly, the Court's previous decision of May 25, 2000 is incorporated here by reference, and the discussion here is limited to the application of recent Supreme Court precedent.

The Court begins with an analysis the cases referenced by the Sixth Circuit. In Watchtower Bible and Tract Society of New York. Inc. v. Village of Stratton, 536 U.S. 150 (2002), a local ordinance prohibited door-to-door advocacy without first registering with the mayor and obtaining a permit. The permits were free and routinely issued, but they had to be carried by any canvasser and were subject to inspection by police.

Without specifically assigning a level of scrutiny, the Supreme Court invalidated the ordinance as overbroad. The village asserted that the purposes of the ordinance were to prevent fraud and crime, and to protect residents' privacy. The permit requirement, however, encompassed all speech, including highly protected political and religious expression historically afforded the highest levels of First Amendment protection. The permit requirement also precluded spontaneous advocacy. Given the breadth of the restrictions, the ordinance was not tailored to achieving the stated governmental interests. Id. at 165-69.

Watchtower involved restrictions on all speech, including highly protected political and religious advocacy, of a "breadth and unprecedented nature". Id. at 168. The ordinance bears no resemblance to the statute at issued here, so the decision does not bear on this Court's previous analysis.

In City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (20021, a local ordinance prohibited the inclusion of more than one adult entertainment business within the same building or structure. The ordinance was based on a study showing that concentrations of adult entertainment businesses are associated with increased crime in the surrounding community. The Supreme Court applied intermediate scrutiny to the ordinance because the ordinance was not aimed at the content of the products of the businesses, but rather at the secondary criminal effects.

The plurality opinion in Alameda is instructive regarding the evidentiary burdens required to justify content-neutral restrictions. A legislature may rely on evidence "reasonably believed to be relevant" for demonstrating the connection between speech and the governmental interest. A challenger must then cast doubt upon the legislature's rationale or evidence. Id. at 438, citing, Renton v. Playtime Theatres Inc., 475 U.S. 41, 51-52 (1986). A legislature also may make common sense inferences from empirical data and be given a reasonable opportunity to experiment with solutions to address the secondary effects of protected speech. Alameda, 535 U.S. at 438, citing, Renton, 475 U.S. at 52. Justice Kennedy concurred with the plurality opinion regarding these evidentiary requirements. Alameda, 535 U.S. at 449, 451.

The Plaintiffs do not dispute the Congressional findings, relied upon by the Defendant, that child pornography is a substantial governmental interest about which legislation is appropriate. It also is a reasonable conclusion that age verification is one method of reducing the likelihood that children are exploited in sexually explicit entertainment. The Plaintiffs' primary evidentiary objection is that the Defendant has not demonstrated that *universal* age verification is tailored to promoting the government's interest. The Plaintiffs argue that there is no rationale for requiring adults in their thirties, forties, and even fifties to provide age verification when they obviously are of the age of majority. Indeed, in the 1996 preliminary hearing, the government's witness on this issue acknowledged that the adult ages of numerous participants were obvious in the Plaintiffs' publications solely from the magazine photographs.

However, despite the Plaintiffs' contention that the swinging lifestyle is essentially a middle-aged phenomenon, there are numerous examples in evidence of participants in their early twenties, and some as young as eighteen and nineteen. (See, e.g., Defendant's Memorandum In Support of Motion For Summary Judgment, Docket No. 93, at 19-22; Defendant's Memorandum In Reply, Docket No. 96, at 19-24.) Age verification is appropriate to ensure that these younger individuals are indeed adults. Age verification is also appropriate to ensure that adolescents who may look older are not subjected to sexual exploitation.

In addition, the Court finds that universal age verification is reasonable. The Plaintiffs' position would require the government to carve out an exception based upon the nature of their particular business model. Presumably, other adult businesses would then demand comparable individualized treatment. The Plaintiffs' approach, therefore, would present an unworkable web of separate standards, business by business, that would be open to charges of vagueness and equal protection problems. Such a system would be difficult, if not impossible, to enforce. Accordingly, the Court concludes that consistent with the standards set forth in Alameda, the Defendant has satisfied its evidentiary burdens that universal age verification is an appropriate manner to combat child pornography.

In Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002), the Supreme Court addressed the validity of certain clauses of the definition of child pornography contained in 18 U.S.C. § 2256 at that time. Specifically, the Supreme Court addressed prohibitions against images that "appear to be" or "convey the impression" of minors engaged in sexually explicit conduct. These provisions prohibited depictions of conduct that did not involve actual minors, such as computer generated images, or images of adults made to look like minors. These provisions also arguably prohibited depictions that were suggestive while not showing actual sexual conduct. Indeed, the Supreme Court noted that the definition is broad enough to preclude a wide range of speech of "serious literary, artistic, political, or scientific value". Id. at 246. The Court held these provisions to be invalid as vague and overbroad.

The former definition of child pornography was a content-based restriction that directly prohibited broad classes of speech. The challenge to the current record requirements are not comparable because they are content-neutral and merely require age verification of participants. No speech is actually prohibited. Accordingly, Free Speech Coalition is inapposite.

In United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000), the Supreme Court addressed requirements that cable television operators prevent "signal bleed" of sexually explicit programming. Signal bleed occurs when one call hear or see incomplete video or audio portions of otherwise scrambled programming. The law required cable operators either to fully block sexually explicit programming to non-subscribers, or "time channel" such programming by airing it only between 10:00 p.m. and 6:00 a.m. Purveyors of adult cable programming challenged the restrictions.

Unlike the current case, the Supreme Court in Playboy Entertainment concluded that the restrictions were content-based and applied strict scrutiny. The restrictions were deemed invalid because there were less restrictive means of furthering the government's interests. Id. at 816, 827.

Playboy Entertainment has no bearing on this case because intermediates scrutiny applies here. Under intermediate scrutiny, a statute is narrowly tailored if it promotes a substantial governmental interest that would be achieved less effectively absent the statute. Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622, 662 (1994), citing, Ward, 491 U.S. at 799. Although a statute must leave open alternative channels of communication, it need not be the least restrictive means of advancing the government's interest. Turner, 512 U.S. at 662; DLS, Inc. v. City of Chattanooga, 107 F.3d 403, 412 (6th Cir. 1997), citing, Ward, 491 U.S. at 799. In Playboy Entertainment, the Supreme Court stated: "We have made clear that the lesser scrutiny afforded regulations targeting secondary effects . . . has no application to content-based regulations targeting the primary effects of protected speech." Id. at 815. By the same reasoning, strict scrutiny cases have no application in analyzing content-neutral restrictions, such as the records requirements challenged here. Therefore, this Court's previous conclusions, rendered by application of intermediate scrutiny, are still valid in view of Playboy Entertainment.

In addition to the four cases specifically referenced in the Sixth Circuit's remand order, the Court has identified the following recent Supreme Court cases worthy of discussion. In Ashcroft v. American Civil Liberties Union, 542 U.S. 656 (2004), the Supreme Court analyzed a provision of the Child Online Protection Act ("COPA") that prohibits the knowing posting of material on the Internet "for commercial purposes" that is "harmful to minors". The statute provides an affirmative defense for those who employ specified means to prevent minors from gaining access to the prohibited materials.

The stated purpose of the statute is to protect minors from gaining access to sexually explicit materials deemed harmful. The Supreme Court upheld a district court's grant of a preliminary injunction against enforcement of the statute. In determining the likelihood of success on the merits, the Supreme Court concluded that the statute was a content-based restriction and applied strict scrutiny. Following Playboy Entertainment, supra., the court found that evidence of less restrictive alternatives is sufficient to justify the preliminary injunction. Id. at 670.

Ashcroft directly relied upon and followed the analysis in Playboy Entertainment. Therefore, Ashcroft is inapposite for the same reasons

In City of Littleton v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774 (2004), the Supreme Court addressed whether a licensing scheme for adult businesses provided for adequate and timely court review procedures. The court concluded that because the licensing scheme did not seek to censor content, but instead provided neutral and nondiscretionary licensing criteria, simple judicial review was required. Id. at 782-84. Though procedural in nature, this case confirms a lesser standard of scrutiny for content-neutral statutes, and thus supports this Court's previous decision.

In United States v. American Library Association, Inc., 539 U.S. 194 (2003), the Supreme Court reviewed a Congressional statute regulating how libraries provide Internet access. The statute provides that as a condition of receiving federal funds to provide Internet access, libraries must employ blocking or filtering software to prevent access to illegal materials such as obscenity and child pornography, as well as prevent minors' access to sexually explicit and other harmful materials. A group of library associations, patrons, and civil liberties organizations challenged the restriction on First Amendment grounds. They argued that the blocking and filtering programs were imprecise and inevitably blocked access to legal materials, including materials with educational and research value.

The Supreme Court upheld the statute in part on the grounds that the restrictions were sufficiently tailored to the interests of protecting library patrons, particularly minors, from accessing illegal and/or potentially harmful materials. The Court noted that the blocking programs generally fulfilled their purpose, and the programs could be disabled or altered by library employees if specific situations warranted. Id. at 208-209.

American Library supports this Court's previous decision that the current statute is narrowly tailored. Restrictions are valid so long as they further the government's interest while not overly restricting protected expression. As stated in the Court's previous decision, the current statute does not prohibit any speech, but only requires participants to provide the Plaintiff with records verifying identity and age. In addition, the restrictions leave open alternative avenues of practicing the swinging lifestyle.

Pursuant to the Sixth Circuit's remand order, this Court has reviewed recent Supreme Court decisions to determine whether reconsideration and reversal of this Court's prior decision is warranted. Upon review of applicable case law, the Court concludes that recent decisions of the Supreme Court do not warrant a reversal of this Court's granting of summary judgment on May 25, 2000. Accordingly, summary judgment is granted as to Counts 1 through 4 that the statute does not violate the Plaintiffs' First Amendment rights.

B. The Amended Complaint

In Counts 5 through 7, the Plaintiffs assert that the statute, as amended on April 20,2003, violates their Fifth Amendment rights, particularly the right against self-incrimination. The original statute permitted use of the records only in prosecutions for violations of the records requirements themselves. The amended statute more broadly permits use of the records in prosecutions for federal obscenity and child pornography offenses well.

In determining whether a record keeping statute violates the Fifth Amendment, the Court analyzes the following factors: (1) whether the statute is directed at a highly selective group inherently suspect of criminal activity; (2) whether the regulation is in an area of law permeated with criminal statutes; and (3) whether compliant with the statute creates a substantial likelihood of prosecution. United States v. Alkhafaji, 754 F.2d 641, 643 (6th Cir. 1985), citing, Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965); see also California v. Byers, 402 U.S. 424, 430 (1971); Grosso v. United States, 390 U.S. 62, 64 (1968); Leary v. United States, 395 U.S. 6, 12-13 (1969); Securities and Exchange Commission v. Fehn, 97 F.3d 1276,1292-93 (9th Cir. 1996), cert denied, 522 U.S. 813 (1997).

Only the second factor, that this area of law is permeated with criminal statutes, favors the Plaintiffs. The regulation of sexually explicit materials includes various criminal offenses such as obscenity and child pornography. This factor also is satisfied if the records would involve an admission of an element of a crime or supply a significant link in the chain of evidence tending to establish guilt. Alkhafaji, 754 F.2d at 644; Marchetti v. United States, 390 U.S. 39, 48 (1968). To the extent one of the Plaintiffs' customers engages in obscenity or child pornography, the records could provide evidence of age and participation.

The other two factors, however, weigh against the Plaintiffs. The first factor weighs in favor of constitutionality when many people fulfilling the records requirements are engaged in lawful activity.

When such is case, the statute is not directed at a "highly selective and inherently suspect" group of people. Alkhafaji, 754 F.2d at 647; Byers, 402 U.S. at 430-31. A statute is valid when it serves a legitimate regulatory purpose. Fehn, 97 F.3d at 1292. In contrast, a records statute is invalid when its primary purpose is to supply evidence for use in criminal prosecutions, and principally targets those engaged in illegal activity. Haynes v. United States, 390 U.S. 85, 96-97 (1968); Grosso, 390 U.S. at 68.

Here, the primary purpose of the statute is regulatory - to protect children by preventing their exploitation in sexually explicit materials. Although criminal prosecution is contemplated, the statute also is intended to act as a deterrent against the exploitation of children before it occurs. The prosecutions that occur, therefore, flow from the regulatory purpose of protecting children. In addition, adult participation in the Plaintiffs' publications is lawful, so the participants do not constitute an inherently suspect group.

This case stands in contrast to those cases in which regulations or statutes were invalidated. In such cases complying with the records requirements was tantamount to an admission a crime. In Albertson, the law required persons to admit membership in the Communist Party, which by itself was illegal at that time. In Marchetti and Gross, the records constituted direct admissions that one had engaged in illegal gambling activity, and the records in Haynes pertained almost exclusively to possessors of firearms deemed illegal, like sawed-off shotguns and the like. In Leary, the records specifically identified any complying individual as a marijuana possessor. In the current case, however, the records requirements do not demonstrate participation in any illegal activity. Adults are free to place ads in the Plaintiffs' magazines, and nothing in the records requirements alters that fact. The Plaintiffs and their customers, therefore, do no constitute an inherently suspect group.

The third factor also weighs against the Plaintiffs. This factor is whether compliance with the statute creates a substantial likelihood of prosecution. To be invalid, there must be reasonable cause to apprehend danger of prosecution from a direct answer. A danger that is speculative or unsubstantial does not suffice. Ohio v. Reiner, 532 U.S. 17, 21 (2001); States v. Apfelbaum, 445 U.S. 115, 128-29 (1980); Marchetti, 390 U.S. at 48. As shown in the previous paragraph, merely fulfilling the records requirements does not demonstrate involvement in criminal activity, and thus does not present a danger of prosecution. Adult participation in the Plaintiffs' magazines is legal.

The Plaintiffs cite numerous cases over the past thirty years of obscenity prosecutions and examples of alleged over-zealous enforcement. The Plaintiffs, however, do not demonstrate that these numbers are significant given the pervasive availability of sexually explicit materials and the enormous revenues generated by the industry. (See, ex., Defendants' Reply, Docket No. 110, at 13.) In particular, none of the cases cited involve the Plaintiffs, their customers, or the "swinging lifestyle" generally. Accordingly, any purported threat of prosecution is speculative and insubstantial.

For the foregoing reasons, the Court concludes that the statute, as amended on April 30, 2003, does not violate the Fifth Amendment.[1]

C. The Recent Regulations

The regulations effective June 23, 2005 present two issues: (1) whether the application of 18 U.S.C. § 2257 to the Plaintiffs' online service violates their constitutional rights, and (2) whether the regulations regarding the timing and nature of inspections, and the copying and seizure of the records, are constitutional.

With regard to the Plaintiffs' online service, intermediate scrutiny requires that a statute leave open alternative channels of communication. Turner, 512 U.S. at 662; DLS. Inc. v. City of Chattanooga, 107 F.3d 403. 412 (6th Cir. 1997), citing, Ward, 491 U.S. at 799. In this Court's previous opinion, the Internet was touted as a viable alternative avenue of communication. The Plaintiffs' argue that the new regulations render the statute unconstitutional because it closes a significant alternative channel of communication.

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[1] The Plaintiffs rely on In re Grand Jury Subpona. 368 F. Supp. 2d 846 (W.D. Tenn. 2005). The Court rejects its analysis in favor of the analysis in this opinion. The Plaintiffs also argue that the amended statute violates the First Amendment because it imposes additional restrictions on expression. This Court (and Congress and the Sixth Circuit) cited the prior limits on using the records in criminal prosecutions as one way the statute is narrowly tailored to protecting children. This ground. however. was not the sole reason why this Court deemed the statute to be sufficiently tailored. The remaining reasons from this Court's previous decision are unaffected and sufficient to find the statute constitutional under the First Amendment.

The Plaintiffs assert that compliance with the regulations is impossible as to the online service because content is in the sole control of the members, not the Plaintiffs. It would be impossible for the Plaintiffs to monitor the postings in thousands of member profiles, each containing numerous pictures (up to one hundred) and subject to frequent change. The Plaintiffs also cannot control what is said in the chat rooms and shown using web cams. Their only option would be to shut down the online service.

The Court disagrees. Based upon the evidence in the briefing and adduced at the hearing, the Court concludes that with respect to their online service, the Plaintiffs provide web-hosting services and/or remote computing services as to which they reasonably cannot manage the sexually explicit content, Accordingly, the exemptions contained in 28 CFR § 75.1(c)(4)(iv) and (v) apply. Because the online service is exempt from the records requirements, there is no constitutional violation. In addition, as stated in the Court's previous decision, there are other alternative means of practicing the swinging lifestyle, including the use of non-explicit photographs, voice mail, e-mail, and private clubs.

The Court also concludes that the new regulations regarding the timing and manner of inspection are constitutional. Again, the Plaintiffs argue that the regulations violate the Fifth Amendment right against self-incrimination. The regulations, however, do not alter the nature of the overall statutory and regulatory scheme as analyzed in Section B above. For the same reasons, there still is no Fifth Amendment violation.

In addition to the previous arguments, the

Plaintiffs also argue that the new regulations governing seizure of the records provide an additional basis for violations of the First Amendment. In Marcus v. Search Warrants of Property at 104 East Tenth Street, 367 U.S. 717 (1961), the Supreme Court held that procedures for seizing allegedly obscene materials must contain sufficient safeguards to protect legitimate expression. The concern was that seizure procedures could be overly used resulting in suppression of constitutionally protected expression. In Marcus, statute granted law-enforcement officers broad discretion to determine if material was obscene. A warrant had to issue for seizure, but the process was *ex parte* and highly deferential to the officer's opinions to the point where the review was essentially meaningless. There was no procedure for in-depth analysis as to whether an officer was correct in deciding that materials met the legal definition of obscenity, as opposed to legitimate expression. Id. at 731-33.

The Plaintiffs similarly rely on Roaden v. Kentucky, 413 U.S. 496 (1973), Theater, Inc. v. Virginia, 392 U.S. 636 (1968), and A Quantity of Copies of Books . Kansas, 378 U.S. 205 (1964). In each of these cases, law enforcement officials were given broad discretion to determine whether materials were obscene, and then seize them. There was little or no process to check that discretion to ensure that legitimate expression protected.

Importantly, in these cases the actual sexually explicit content was seized. Therefore, expression was effectively removed from public access, often permanently if the materials were subsequently destroyed. In this case, however, only the identification records, and not the expressive content, can be seized. The legitimacy of the expression, therefore, is not determined by the inspectors, but would be determined during a subsequent adversary process. Expression, therefore, is not curbed as in the cases cited by the Plaintiffs.

For the foregoing reasons, the Court concludes that the new regulations, effective June 23, 2005, do not render the statute unconstitutional.

IV. CONCLUSION

Pursuant to the Sixth Circuit's remand order of September 24, 2002, this Court has permitted additional discovery and reconsidered its decision of May 25, 2000 in light of applicable recent Supreme Court precedent. The Court concludes, as before, that 18 U.S.C. § 2257 is constitutional as a matter of law.

In addition, the Court has considered whether a different determination is warranted due to the statutory amendments of April 20, 2003, and the new regulations effective June 23, 2005. For the foregoing reasons, the Court concludes at the statute remains constitutional in view of the statutory and regulatory amendments. The Plaintiffs thus cannot demonstrate any likelihood of success on the merits as required under the preliminary injunction standard.

Accordingly, the Plaintiffs' motions for preliminary injunction (Docket Nos. 108 and 118) are DENIED. The Defendant's motion for summary judgment (Docket No. 105) is GRANTED, and this action is hereby dismissed with prejudice, each party to bear its own costs.

IT IS SO ORDERED.

Issued: May 10, 2006

s/ John M. Manos
UNITED STATES
DISTRICT JUDGE

FILED
SEP 24 2002
LEONARD GREEN, Clerk

NOT RECOMMENDED FOR PUBLICATION

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
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UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CONNECTION DISTRIBUTING CO.

Plaintiff-Appellant,

v.

JANET RENO,
Attorney General,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

ORDER

BEFORE: NORRIS and CLAY, Circuit Judges;

BORMAN, District Judge.[*]

PER CURIAM. Plaintiff, Connection Distributing, Inc.,appeals from the district court's order entered on May 25, 2000, granting summary judgment to Defendant, United States Attorney General Janet Reno,[1] in this case filed by Plaintiff claiming that the record-keeping provisions of the Child Protection Restoration and Penalties Enhancement Act, 18 U.S.C. § 2257, were unconstitutional as applied to Plaintiff.

We now **REVERSE** the district court's order granting summary judgment to Defendant, and **REMAND** to the district court with instructions that the court allow the parties additional discovery, and to thereafter reconsider the matter in light of recent Supreme Court precedent including, but not limited to, *Watchtower Bible & Tract Society of N.Y., Inc. v. Village of Stratton,* ___ U.S. ___, 122 S. Ct. 2080 (2002); *City of Los Angeles v. Alameda Books, Inc.,* 122 S. Ct. 1728 (2002); *Ashcroft v. Free Speech Coalition,* ____U.S. ___, 122 S. Ct. 1389 (2002); and *United States v. Playboy Entertainment, Inc.,* 529 U.S. 803 (2000). In doing so, we find that the district court was correct in concluding that our prior decision affirming the district court's denial of a preliminary injunction, *see Connection Distrib. Co. v. Reno,* 154 F.3d 281 (6th Cir. 1998), constituted the law of the case as to the level of scrutiny to be applied.[2] *See Wilcox* v. *United States,* 888 F.2d 1111, 1114 (6th Cir. 1989); *see also Royal Ins. Co. of Am. v. Quinn-L-Capital Corp.,* 3 F.3d 887, 881 (5th Cir. 1993); 18B CHARLES ALAN WRIGHT ET AL.,FEDERAL PRACTICE & PROCEDURE §4478.5 (2d ed. 2002). In all other respects, however, we remand for further consideration in light of recent Supreme Court decisions.

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[*] Honorable Paul D. Borman. United Stales -District Judge for the Eastern District of Michigan. sitting by designation.

[1] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), current United States Attorney General John D. Ashcroft has now been substituted as the defendant/appellee in this case.

ALAN E. NORRIS, Circuit Judge, dissenting. Because I disagree with the majority's conclusion that the four Supreme Court cases that it cites affect the constitutionality of the statute before us, I respectfully dissent. I would instead follow the rationale set forth in *American Library Ass'n v. Reno,* 33 F.3d 78 (D.C. Cir. 1994), and affirm the judgment of the district court.

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[2] Specifically, in *Connection,* we held that the "intermediate level of scrutiny" was to be applied to Plaintiffs constitutional challenge, and that "[u]nder this standard, a government regulation is constitutional if the obligations it imposes are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication of the information." *Connection Distib. Co. v. Reno,* 154 F.3d 281, 291 (6th Cir. 1998) (internal quotation marks and citation omitted).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CONNECTION) CASE NO. 1:95CV1993
DISTRIBUTING CO.)
)
Plaintiff,)
)
vs.) Judge John M. Manos
)
JANET RENO,)
ATTORNEY GENERAL,)
) MEMORANDUM OF
Defendant.) OPINION

On November 15, 1999, Defendant Janet Reno, in her capacity as Attorney General of the United States, filed a Motion for Summary Judgment (Docket No. 57). On January 18, 2000, Plaintiff Connection Distributing Co. ("Connection"), filed a memorandum In Opposition, to which the Defendant replied on February 1, 2000. On April 20, 2000, the Plaintiff sought leave to file additional affidavits, which the Court granted. The parties have fully briefed these issues.

For the following reason, the motion is GRANTED.

I. FACTS

On September 13, 1995, the Plaintiff filed this action seeking declaratory and injunctive relief to prohibit enforcement of the Child Protection Restoration and Penalties Enhancement Act of 1990, codified as 18 U.S.C. § 2257. The Act essentially requires producers of materials containing visual depictions of "actually sexually explicit conduct", as defined therein, to create and maintain records concerning the identity and age of all performers depicted. 18 U.S.C. §§ 2257(a) and (h)(1).

Producers must ascertain and record each performer's name (including any professional name, nickname, or alias used by such person) and date of birth. 18 U.S.C. §2257(b); 28 C.F.R. § 75.2(a). In addition, a legible copy of an identification document (*e.g.*, driver's license, passport, or state identification card) must be kept verifying the personal information of each performer. 28 C.F.R. §75.2(a)(1). Producers also must maintain these records at their business premises and are required to make them available to the Attorney General for inspection at all reasonable times. 18 U.S.C. § 2257(c); 28 C.F.R. §§ 75.4 and 75.5. Furthermore, each book, magazine, periodical, film or videotape covered by the Act must contain a conspicuous statement of the address at which the records are kept. 18 U.S.C. §2257(e); 28 C.F.R. §75.6. Any producer who does not comply with the Act is subject to criminal penalties. 18 U.S.C. § 2257(I).

The Plaintiff is a Cleveland corporation that publishes sexually explicit "swinger" magazines. According to Patricia Prementine, Editor of Connection and a self-proclaimed swinger, "swinger" is "an alternative social and sexual lifestyle comprised mostly of mature adults who believe in sexual freedom and do not believe in sexual monogamy. [Swingers] allow their partners the freedom to experience sexual relationships with others." (Transcript at 4.)[1] The Plaintiff's magazines consist, *inter alia*, of advertisements placed by individuals seeking to meet others in the swinging lifestyle. The ads, which generally contain the author's biographical information, personal facts, and an identification number, are often accompanied by one or more sexually explicit photographs. Individuals who wish to respond to an ad may submit a letter to the Plaintiff which, for a handling fee, will forward the correspondence to the person who placed the ad (the "author"). In this fashion, the identity of the author remains confidential.[2]

On September 13, 1995, the Plaintiff filed this action seeking declaratory and injunctive relief to prohibit enforcement of the Act. Count One alleges that the Act, as applied to the Plaintiff, violates the First Amendment, in that it (a) suppresses free speech; (b) represents a prior restraint; (c) chills protected speech; and (d) is overbroad. In Count Three, Connection invokes the theory of "associational standing" and asserts the same constitutional violations on behalf of those persons who wish to place personal ads. See, e.g., N.A.A.C.P. v. Alabama, 357 U.S. 449, 458-60 (1957) (organization has standing to assert the constitutional rights of its members when sufficient nexus of interests exists). Counts Two and Four merely restate the allegations of Counts One and Three, respectively, and request that the Court order declaratory and injunctive relief.

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[1] References to the "Transcript" are to the Transcript from the preliminary injunction hearing, held on April 8 and 9, 1996.

[2] While the identity of the author is not known to the general public, Connection

Contemporaneously with filing the Complaint, the Plaintiff filed a motion for a preliminary injunction requesting the Court to prohibit enforcement of the Act pending a final decision on the merits. On April 8 and 9, 1996, the Court held an evidentiary hearing. On January 16, 1997, the Court denied the motion for a preliminary injunction (see Memorandum of Opinion and Order dated 1/16/97), and the Plaintiff took an interlocutory appeal. On August 17, 1998, the Sixth Circuit affirmed. See Connection Distributing Co. v. Reno, 154 F.3d 281 (6th Cir. 1998). The evidence from the hearing is described in detail in this Court's previous opinion and the opinion of the Sixth Circuit.

On April 30, 1999, the United States Supreme Court denied a petition for a writ of certiorari. See Connection Distributing Co. v. Reno, 119 S. Ct. 1496 (1999). The case then returned to this Court for final disposition.

On November 15,1999, the Defendant filed the current motion. She essentially asserts that the Sixth Circuit's decision entitles her to summary judgment, and that the Act is constitutional. The Defendant also filed a motion to stay discovery pending a decision on the motion for summary judgment. On December 14, 1999, the Court granted the motion to stay discovery. The Plaintiff alleges that, despite the Sixth Circuit's decision, genuine issues of material fact exist, and additional discovery is required. The parties have fully briefed these issues.

II. LAW AND ANALYSIS

A. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entiGkd to judgment as a matter of law." Fed. R. Civ. P. 56(c).

The party moving for summary judgment bears the initial burden of production under Rule 56. The burden may be satisfied by presenting affirmative evidence that negates an element of the non-movant's claim or by demonstrating "an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

If the movant meets this burden, the non-movant must "set forth the specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The substantive law identifies which specific facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242,248 (1986). To avoid summary judgment, the non-movant must "make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322.

"The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson, 477 U.S. at 256 (citing Adickes v. Kress & Co., 398 U.S. 144, 158-59 (1970)). However, the non-movant must "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). "[T]he mere existence of some alleged factual disputes between the parties will not defeat an otherwise properly supported motion" for summary judgment. Anderson, 477 U.S. at 247-48.

B. Law of the Case

The Defendant alleges that the Sixth Circuit's decision is "law of the case", and therefore is determinative of this action. The Plaintiff, however, argues that the law-of-the-case doctrine does not apply to interlocutory appeals of district court decisions on preliminary injunctions.

The law-of-the-case doctrine generally provides that issues decided at an earlier stage of a case binds the court at subsequent stages, particularly on remand from an appellate court. Hanover Insurance Co. v. American Engineering Co., 105 F.3d 306, 312 (6th Cir. 1997); Miles v. Kohl & Kaliher Associates, Ltd., 917 F.2d 235, 241 (6th Cir. 1990). Principles of law established by an appellate court, even if pronounced in a preliminary injunction posture, constitute law of the case. Roe v. State of Alabama, 68 F.3d 404, 408 (11th Cir. 1995); see also Michigan State AFL-CIO, International Union v. Miller, 6 F. Supp. 2d 634,637-38 (E.D. Mich. 1998) (legal issues decided by the Sixth Circuit in preliminary injunction ruling was law of the case on remand).

The doctrine, however, is not absolute. The Sixth Circuit has established three bases to reconsider a previous appellate ruling: (1) substantially different evidence is raised during a subsequent trial; (2)

reconsideration is required by a subsequent change in controlling authority; or (3) a decision is clearly erroneous and would work a manifest injustice. Hanover, 105 F.3d at 306.

The Plaintiff argues that the law-of-the-case doctrine does not apply in the preliminary injunction context. The reason is that a preliminary injunction is designed to maintain the status quo pending trial on the merits, but is not itself a final determination. Courts addressing this issue have reached different conclusions. Compare: Wilcox v. United States, 888 F.2d 1111, 1113-14 (6th Cir. 1989) and The Council of Alternative Political Parties v Hooks, 179 F.3d 64, 69-70 (3d. Cir. 1999) (denying that a preliminary injunction ruling was law of the case), to Roe and Miller, supra, (holding preliminary injunction ruling was law of the case).

The Court concludes that these decisions can be reconciled, particularly in view of the analytical framework described in the Sixth Circuit's controlling decision in Hanover, supra. In Wilcox, the district court gave preclusive effect to a Magistrate's findings without doing its own review. In Hooks, the court described the previous ruling as "avowedly preliminary or tentative". These cases, therefore, fall within the first Hanover exception that substantially different evidence might be adduced at a full trial. In Hooks, there also had been an intervening change in the controlling law. In contrast, Roe and Miller primarily concerned applications of legal standards which were not subject to evidentiary proof, and which remained controlling law. Thus, none of the Hanover exceptions could apply. Based on these cases, there is no blanket rule as to whether law-of-the-case applies in the preliminary injunction context. The doctrine applies to appellate determinations of legal issues, or conclusions based on undisputed facts. In contrast, it does not apply when disputed factual issues remain for determination on remand.

In the following sections, therefore, the Court applies the law-of-the-case doctrine to the various issues presented as follows. Any legal standards set forth by the Sixth Circuit are law of the case, unless altered by intervening controlling authority. In addition, to the extent the anticipated evidence, as described by the Plaintiff, could not result in a different conclusion, the Sixth Circuit's decision also is law of the case. If, however, the evidence anticipated by the Plaintiff at trial is such that the Sixth Circuit did not reach certain issues, or would be substantially different, law of the case does not apply to those issues.

C. The Merits of the Plaintiffs Claims

1. Level of Scrutiny

In its previous decision, the Court applied "intermediate scrutiny" to analyze the constitutionality of the Act. The Sixth Circuit agreed. Under this standard, a statute or regulation is constitutional if its obligations are narrowly tailored to further a significant governmental interest, and leaves open alternative channels for communication. Connection, 154 F.3d at 291, citing, Ward v. Rock Against Racism, 491 U.S. 781,791 (1989); see also American Librarv Association v. Reno, 33 F.3d 78, 87 (D.D. Cir. 1994), cert. denied, 515 U.S. 1158 (1995) (applying intermediate scrutiny to the same records requirements at issue here). The Plaintiff argues that this Court and the Sixth Circuit applied the wrong standard.

The Sixth Circuit stated: "In determining whether the Act inappropriately hinders the exercise of the protected speech at issue, it is necessary first to determine whether the Act is content-based or content-neutral because that determination will decide the level of scrutiny." 154 F.3d at 290. It concluded the Act was content-neutral, and therefore subject to intermediate scrutiny.[3] In making this determination, the Sixth Circuit relied on the statutory language and the intent of Congress as revealed in the legislative history. Id. at 290-91. This information was considered by this Court in its previous decision. The level of scrutiny to be applied, therefore, is not a determination that could be altered by additional evidence or discovery. Accordingly, the Sixth Circuit's application of intermediate scrutiny is law of the case and must be followed by this Court.

The Plaintiff relies on cases from other circuits which applied strict scrutiny in analyzing various provisions of the Act, although not the record keeping provisions at issue here. See The Free Speech Coalition v. Reno, 198 F.3d 1083, 1090-91 (9th Cir. 1999); United States v. Acheson, 195 F.3d 645, 650 (11th Cir. 1999); United States v. Hilton, 167 F.3d 61, 68-69 (1st Cir.), cert. denied, 120 S. Ct. 115 (1999). The Plaintiff argues the Court should follow these circuits, instead of the Sixth Circuit, and apply strict scrutiny.

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[3] Content-based restrictions are subject to strict s&tiny. They will be upheld only if they promote a compelling governmental interest and do so by the least restrictive means. Sable Communications of California Inc. v. F.C.C., 492 U.S. 115, 126 (1989); Simon & Schuster. Inc. v. Members of the New York State Crime Victims Board, 502 U.S. 105, 115-16 (1991).

Although under Hanover, supra. the law-of-the-case doctrine does not apply if there has been a change in controlling law, decisions from other circuits do not meet this standard. Reconsideration requires intervention of a pertinent change in the applicable statute or Supreme Court decisional law. Miller, 6 F. Supp. 2d at 638, citing, Hawkes v. Internal Revenue Service, 507 F.2d 481,482 (6th Cir. 1974). Accordingly, ths Court must apply intermediate scrutiny, the same standard the Sixth Circuit applied during the preliminary injunction proceedings.

2. Application of Intermediate Scrutiny

As stated above, under intermediate scrutiny a statute or regulation is constitutional if its obligations are narrowly tailored to further a significant governmental interest, and leaves open alternative channels for communication. Connection, 154 F.3d at 291, citing, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). A statute is narrowly tailored if it promotes a substantial governmental interest that would be achieved less effectively absent the statute. Turner Broadcasting System. Inc. v. F.C.C., 512 U.S. 622, 662 (1994), citing, Ward, 491 U.S. at 799. The parties do not dispute that preventing child pornography is a significant governmental interest. The Plaintiff argues, however, that the records requirements of the Act are not tailored to further this interest, nor leave open alternative channels for communication.

The Plaintiff argues that the Act does not further the interest in preventing child pornography because the records cannot be used, directly or indirectly, in prosecuting violations of child pornography laws other than the record keeping requirements themselves. See 18 U.S.C. § 2257(d). The Court disagrees. This limitation was added by Congress to address concerns about overly restricting expressive activity. If anything, it supports the conclusion that the Act is narrowly tailored. Criminal penalties exist for violating the records requirements, even though such records cannot be use in prosecutions under other laws. As the Sixth Circuit concluded, a universal requirement of age disclosure furthers the government's interest in ensuring that minors are not depicted engaging in sexual conduct. Connection, 154 F.3d at 292. This conclusion is not altered by the Act's limits on using the records only in specific criminal prosecutions.

Relatedly, the Plaintiff argues that amendments to the Act in 1996, after the Court's hearing, render the records requirements insignificant. Specifically, the Act now prohibits not only visual depictions of minors, but also visual depictions of adults who appear to be minors or presented in a way to give the impression that minors are featured. The Plaintiff argues that these changes render age irrelevant, and therefore any requirement of age disclosure is meaningless. The Plaintiff is incorrect that age is irrelevant. The purposes of the Act include preventing the psychological and physical damage to minors who participate in pornography. Thus, the Act prevents all depictions of minors, even, for example, depictions of minors who may appear like adults. Accordingly, age still is relevant, and age disclosure particularly is important to protecting children who may appear older than their years.

The Plaintiff also argues that the records requirements do not leave open alternative channels of communication. Although to survive intermediate scrutiny a statute must leave open alternative channels of communication, it need not be the least restrictive means of advancing the government's interest. Turner, 512 U.S. at 662; DLS, Inc. v. City of Chattanooga, 107 F.3d 403, 412 (6th Cir. 1997), citing, Ward, 491 U.S. at 799. At the outset, by its terms the statute does not prohibit the Plaintiff from publishing its materials, nor its readers from participating in the "swinging" lifestyle. They simply must fulfill the records requirements if they wish to have sexually explicit photos published. Thus, aside from the issue of whether alternative channels of communication exist, the Court concludes the channel used by the Plaintiff is not prohibited.

As the Sixth Circuit noted, persons still may anonymously publish sexually explicit photos. They merely must provide the identifying information to the Plaintiff when doing so. The publication itself need not contain the identifying information. The Plaintiff does not dispute these facts. The Sixth Circuit concluded: "This condition of entry to this forum for anonymous, sexually explicit speech does not destroy the forum." Connection, 154 F.3d at 294. Because the underlying facts are not in dispute, this conclusion is law of the case.

The plaintiff argues that the record requirements violate the First Amendment right to publish anonymously. It relies on McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995), in which the

Supreme Court invalidated an Ohio law prohibiting anonymous campaign literature. McIntyre is inapposite because it involved "core political speech", subject to "exacting scrutiny". Id. at 347. In addition, as stated above, the identifying information is given to the Plaintiff, but the publication itself can still be done anonymously. The right to publish anonymously, therefore, is not abridged.

Furthermore, record keeping requirements are constitutional if they further a substantial governmental interest and their disclosure is limited as necessary to further the interest. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52,79-81 (1976). There, the Supreme Court upheld requirements to maintain abortion records to promote public health. The records were subject to inspection by state, local, and national public health officials. Similarly, the statute currently at issue furthers a substantial governmental interest in preventing child pornography. The records are not public, or broadly accessible by agencies of government. Only the Attorney General (or her designee) may review them. 18 U.S.C. § 2257(c); 28 CFR § 75.5.[4]

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[4] Similarly, the Plaintiff argues the Act violates the Freedom of Association of those who subscribe to the swinging lifestyle. It relies on Brown v. Socialist Workers Campaign Committee (Ohio), 459 U.S. 87 (1982), and NAACP v State of Alabama, 357 U.S. 449 (1958). Both these cases invalidated requirements that individuals disclose membership in specific political groups. Like McIntyre, these cases involve political speech, and therefore strict scrutiny applied. Thus, these cases are inapplicable here. Furthermore, the records requirements here do not require disclosure of membership in any particular group, or by themselves indicate adherence to a specific political viewpoint.

In addition, in its Statement of the Case, the Plaintiff focuses on its right to promote the controversial "swinging" lifestyle. Essentially, the expression at issue constitutes the promotion and participation in that lifestyle. The evidence during the prior hearing revealed that numerous channels remain available to swingers that are not subject to the records requirements. These include the use of photos that are not "sexually explicit" as defined in the Act, voicemail, the Internet, and private clubs. Thus, persons wishing to engage in swinging have numerous channels in which pursue this lifestyle without being subject to the record requirements. See Connection, 154 F.3d 294.

The Plaintiff argues these alternative channels require its readers to alter the content of the message. The requirement of alternative channels, however, does not mean the channels must be identical. Connection, 154 F.3d at 293-94. In addition, even the use of sexually explicit photos is not prohibited by the records requirements. Thus, these requirements do not mandate a change in how the Plaintiff promotes the swinging lifestyle.

The Plaintiff next argues the records requirements chill speech. In other words, readers will refrain from advertising themselves in the Plaintiffs magazines rather than submit to the records requirements. They fear government officials will not keep the information confidential, and fear reprisals if the records become public. For summary judgment purposes, the Court assumes the Plaintiff can prove its readers will cease advertising. Indeed, it has submitted evidence showing that the number of advertisements has declined since it began following the records requirements. However, this decline, even if proven, would not entitle the Plaintiff to the relief sought.

General regulations targeting prohibited activity are not invalid because they have an incidental effect on First Amendment activities. In Alexander v. United States, 509 U.S. 544 (1993), the Supreme Court upheld application of RICO forfeiture provisions to obscenity violations, even though it could "induce cautious booksellers to practice self-censorship and remove marginally protected materials from their shelves". Id. at 555-56. The Court concluded that because obscenity "could be regulated or actually proscribed consistent with the First Amendment", incidental effects on protected activity did not invalidate the statute. Id. at 557; see also Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 59-60 (1989). Similarly, child pornography can be prohibited consistent with the First Amendment. Therefore, regulations furthering this prohibition are constitutionally permissible even assuming incidental effects on legal activity.

3. Prior Restraint

Finally, the Plaintiff argues the records requirements are unconstitutional because they are a "prior restraint" on free speech. A prior restraint generally is an order forbidding communication in advance. Court orders actually forbidding speech activities are primary examples. Alexander, 509 U.S. at 550. A prior restraint usually is alleged when a public official has been given discretionary power to deny use of a forum in advance of actual expression. Connection, 154 F.3d at 295. Regulations that punish past conduct, rather than bar future speech, are not prior restraints. Alexander, 509 U.S. at 553-54.

The Plaintiff argues that the Act is a prior restraint because the records requirements must be satisfied before publication of sexually explicit materials. The Sixth Circuit rejected this argument, holding that the statute, by its terms, punishes past conduct. Connection, 154 F.3d at 295. Because this conclusion is one of statutory interpretation, it is law of the case. See also The Free Speech Coalition v. Reno, 198 F.3d 1083, 1097 (9th Cir. 1999) (possibility of self-censorship and alleged chilling effect of Child Pornography Prevention Act do not amount to a prior restraint).

III. CONCLUSION

The Sixth Circuit's statutory interpretations, including its decision to apply intermediate scrutiny, are law of the case. Based on these standards, and viewing the factual allegations in the light most favorable to the Plaintiff, no genuine issue of material fact exists as to the Plaintiffs claims. In addition, because the Plaintiffs allegations were viewed favorably to it, additional discovery would not alter this conclusion.

For the foregoing reasons, the Defendant's Motion For Summary Judgment is GRANTED. Accordingly, this action is hereby dismissed with prejudice, each party to bear its own costs.

IT IS SO ORDERED.

/s/ John M. Manos
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CONNECTION) CASE NO. 1:95CV1993
DISTRIBUTING CO.)
)
Plaintiff,)
)
vs.) Judge John M. Manos
)
JANET RENO,)
ATTORNEY GENERAL,)
) ORDER
Defendant.)

Pursuant to the Memorandum of Opinion issued in the above-captioned case this date, the Defendant's Motion for Summary Judgment (Docket No. 57) is GRANTED. Accordingly, this action is hereby dismissed with prejudice, each party to bear its own costs.

IT IS SO ORDERED.

/s/ John M. Manos
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CONNECTION
DISTRIBUTING CO.,
Plaintiff-Appellant,

v.

THE HONORABLE JANET
RENO,
Defendant-Appellee.

No. 97-3092

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.
No. 95-01993 -- John M. Manos, District Judge.

Argued: February 6, 1998

Decided and Filed: August 13, 1998

Before: NORRIS and CLAY, Circuit Judges; BORMAN, District Judge.[*]

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[*] The Honorable Paul D. Borman, United States District Judge for the Eastern District of Michigan, sitting by designation.

COUNSEL

ARGUED: J. Michael Murray, BERKMAN, GORDON, MURRAY, PALDA & DeVAN, Cleveland, Ohio, for Appellant. Anne M. Lobell, U.S. DEPARTMENT OF JUSTICE, CIVIL DIVISION, APPELLATE STAFF, Washington, D.C., for Appellee. **ON BRIEF:** J. Michael Murray, Lorraine R. Baumgardner, BERKMAN, GORDON, MURRAY, PALDA & DeVAN, Cleveland, Ohio, for Appellant. Anne M. Lobell, Jacob M. Lewis, U.S. DEPARTMENT OF JUSTICE, CIVIL DIVISION, APPELLATE STAFF, Washington, D.C., for Appellee.

OPINION

CLAY, Circuit Judge. Plaintiff-Appellant Connection Distributing Company appeals the denial of its motion for preliminary injunction against the enforcement of 18 U.S.C. §2257 and 28 C.F.R. §75, *et seq.*, on the ground that the statute and its implementing regulations violate the First Amendment as applied to Appellant. For the reasons set forth below, we **AFFIRM** the district court's denial of the preliminary injunction.

I. BACKGROUND

A. Nature of the Case

Plaintiff-Appellant Connection Distributing Company ("Connection") filed this action on September

13, 1995, seeking a judgment declaring 18 U.S.C. §2257 (1994) and 28 C.F.R. §75 (1997), *et seq.*, unconstitutional as applied to Connection and its readers and seeking injunctive relief against the Honorable Janet Reno in her official capacity as Attorney General of the United States.

Connection publishes and distributes approximately a dozen so-called "swingers" magazines. Connection defines the philosophy of "swinging" as: "an alternative social and sexual lifestyle comprised mostly of mature adults who believe in sexual freedom and do not believe in sexual monogamy." (J.A. at 44.) Connection's magazines contain, in addition to editorials and feature stories, messages placed by persons whose beliefs and philosophies embrace the "swinging" lifestyle. These individuals and couples place and respond to messages in Connection's various magazines. The messages often contain detailed descriptions of the subscribers' bodies and sexual tastes and frequently are accompanied by sexually explicit photographs of the subscribers. Some messages include photographs with persons simply nude or in street clothes, but may feature individuals or couples engaged in sexually explicit conduct. Although some of the magazines allow the subscriber to place his or her address directly beneath the message, the majority of the people submitting messages identify themselves through a code that appears at the beginning of the text of each message. Readers respond by writing to Connection, which charges a fee to forward the response to the message placer.[1] Connection also offers 900 number voice mailboxes for individuals who wish to respond by telephone, as well as an Internet service.

Connection asserts that the labeling and record-keeping provisions of 18 U.S.C. §2257 and its accompanying regulations violate the First Amendment by unconstitutionally suppressing the free speech rights of Connection and its subscribers, by serving as an unlawful prior restraint, and by violating the free association rights of Connection's subscribers. The challenged record-keeping and labeling provisions require anyone appearing in a sexually explicit visual depiction to produce photographic identification and require anyone publishing such a visual depiction to maintain identification records and label the publication as to the location of those records. *See* 18 U.S.C. §2257 and 28 C.F.R. §75 *et seq.* Connection contends that, because anonymity is important to "swingers," these provisions stand as a barrier to those who wish to exercise their free speech rights to place messages and their free association rights to communicate with other "swingers" in Connection's magazines. Likewise, Connection asserts that its right to publish constitutionally protected expression is diminished because of the effect of the provisions on its subscribers and on Connection itself.

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[1] The terms "subscribers," "advertisers," and "readers" will be used interchangeably to describe those who place messages in Connection's magazines.

B. Legal Framework

Following challenges to the constitutionality of the Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, 102 Stat. 4485, Congress amended the statute through the passage of the Child Protection Restoration and Penalties Enhancement Act of 1990, 18 U.S.C. §2257 (1994) (the "Act" or "Section 2257").[2] Section 2257 is a record-keeping statute that requires all producers of matter containing visual depictions of "actual sexually explicit conduct to create and maintain records of the names and date of birth of the performers portrayed in the depictions. 18 U.S.C. §2257(a), (b) (1994). The Act requires that the records be maintained at the producer's business premises, or as elsewhere permitted by regulations, and that the records be made available "to the Attorney General for inspection at all reasonable times." 18 U.S.C. §2257(c) (1994). In addition, the Act mandates that the producers affix to each copy of material covered by its provisions a statement detailing where the depicted age verification records may be located. 18 U.S.C. §2257(e)(1) (1994).

As defined by the Act, the term "produces" means to "produce, manufacture, or publish," and includes

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[2] Congress amended the record-keeping provisions of the 1988 version of the statute during the pendency of an appeal to the District of Columbia Circuit of a case challenging these provisions brought by a group of librarians and book, magazine, and video publishers, editors, and distributors. *See American Library Ass'n v. Barr*, 956 F.2d 1178, 1181 (D.C. Cir. 1992).

"duplication, reproduction, or reissuing," but does not include "mere distribution or any other activity which does not involve hiring, contracting for managing, or otherwise arranging for the participation of the performers depicted." 18 U.S.C. §2257(h)(3) (1994). A "performer" is defined as "any person portrayed in a visual depiction engaging in, or assisting another person to engage in, actual sexually explicit conduct." 18 U.S.C. §2257(h)(4) (1994). The Act applies only to depictions of "actual sexually explicit conduct," which is defined as: (1) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal sex; (2) bestiality; (3) masturbation; and (4) sadistic or masochistic abuse. *See* 18 U.S.C. §2257(h)(1) (1994) (incorporating definitions of §2256(2)(A)-(D)).

The Act also provides that no information or evidence obtained from the records shall be used "directly or indirectly" as evidence against any person with respect to any violation of law except for the record-keeping provisions themselves. 18 U.S.C. §2257(d) (1994). Persons violating the Act are subject to fines and imprisonment of up to two years for the first offense, and up to five years (but not less than two) for succeeding convictions. 18 U.S.C. §2257(i) (1994).

The regulations propounded by the Attorney General as required by 18 U.S.C. §2257(b)(3) further define the Act's requirements. The regulations divide producers into two categories, "primary" and "secondary." 28 C.F.R. §75.1(c) (1997). A primary producer is one who "actually films, videotapes, or photographs a visual depiction of actual sexually explicit conduct," *id.* §75.1(c)(1), while a secondary producer "produces, assembles, manufactures, publishes, duplicates, reproduces, or reissues" materials contained such depictions that are "intended for commercial distribution." *Id.* §75.1(c)(2).

The regulations require that all producers maintain records that contain "[t]he legal name and date of birth of each performer, obtained by the producer's examination of an identification document." *Id.* §75.2(a)(1). Those records must include a "legible copy of the identification document examined," *id.*, as well as "[a]ny name, other than each performer's legal name, ever used by the performer, including the performer's maiden name, alias, nickname, stage name, or professional name." *Id.* §75.1(c)(3). A secondary producer is permitted to "maintain records by accepting from the primary producer . . . copies of the records" as long as the secondary producer keeps the "name and address of the primary producer." *Id.* §75.2(b).[3]

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[3] In *Sundance Associates, Inc. v. Reno*, No. 96-1501, 1998 WL 127112, at *2-3 (10th Cir. Mar. 23, 1998), the Tenth Circuit struck down part of 28 C.F.R. §75.1(c)(4)(iii) to the extent it requires record-keeping by producers who do not hire, manage, or arrange for the participation of the persons depicted. The court concluded that the regulations were impermissible because they were broader in scope than authorized by the Act. *Id.* We need not reach this issue in the instant case, however, because both parties acknowledge that Connection has made no such contention in this suit.

C. Prior Proceeding

In its Complaint of September 13, 1995, Connection sought a declaratory judgment that the Act and its implementing regulations were unconstitutional under the First Amendment, as well as a temporary restraining order [4] and a preliminary and permanent injunction against the enforcement of the Act against Connection.

On April 8 and 9, 1996, the district court convened an evidentiary hearing on Connection's motion for preliminary injunction. At the hearing, Connection presented the testimony of Patricia Prementine, the editor for the past twelve years of the magazines published by Connection. Prementine testified that people who believe in the philosophy known as "swinging" are engaged in an alternative social and sexual lifestyle and "believe in sexual freedom and do not believe in sexual monogamy." (J.A. at 44.) Prementine testified that most "swingers" are married or couples, have been together for a number of years, and are thirty to fifty years old. (J.A. at 49.)

Prementine estimated that approximately eighty-five to ninety percent of the persons who place ads in Connection's magazines request that their faces be blocked out. (J.A. at 71.) According to Prementine, and based on her personal experiences and contacts with "swingers," privacy and confidentiality are fundamental to the "swinging" lifestyle because the participants fear that their employers, communities, and families will reject them upon learning of their controversial lifestyle. (J.A. at 50-51.) Prementine asserted that, because of these privacy concerns, Connection's publications serve a critical and unique role to those choosing this alternative lifestyle by presenting information about social activities and functions and allowing a means for connecting with others who share their beliefs. (J.A. at 52-53.) Connection also presented the testimony of Robert McGinley as an "expert" on the "swinging" lifestyle.[5] McGinley likewise testified that privacy and confidentiality are very important to "swingers." (J.A. at 179.80.)

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[4] On October 24, 1995, the district court denied Connection's request, filed by separate motion, for a temporary restraining order against the enforcement of the Act. (J.A. at 32)

Prementine states that prior to the passage of the Act, Connection required anyone wishing to place a message in its magazines to sign a release form assuring Connection that he or she was at least twenty-one years of age. (J.A. at 57.) Prementine personally reviewed all the submissions and, if a question arose regarding an individual's age or name, the submission would be returned and necessary verification required. (J.A. at 58-59.) Prementine further testified that when Connection began to make efforts in January 1995 to notify its readers of the new disclosure requirements imposed by the Act and send out its revised advertisement forms, the reader response was low, and there was a significant decline in the number of submissions Connection was receiving. (J.A. at 66-68.) Based solely upon her personal experience and her position as Connection's editor, Prementine opined that the decline in messages was attributable to the passage of the Act. (J.A. at 68.)

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[5] McGinley has a doctorate in counseling psychology and has co-authored a book on "swinging," written numerous articles, appeared on television and radio programs, operated businesses that have sponsored conventions, social events, tours and directories to assist those interested in learning abut or engaging in the "swinging" lifestyle, conducted surveys and studies of "swingers," and had personal contact with thousands of "swingers" over the past twenty years. (J.A. at 171-76.)

The government presented the testimony of Dr. Francis Michael Anthony Biro, the Director of Clinical Affairs in the Division of Adolescent Medicine at Children's Hospital Medical Center in Cincinnati, Ohio. Dr. Biro reviewed several issues of Connection's magazines to attempt to find photographs depicting minors by using a rating system of various stages of pubertal development used in adolescent medicine. (J.A. at 124-25.) Dr. Biro testified that the vast majority of the photographs he examined depicted persons in their thirties, forties, and fifties and did not require photographic identification to establish that they were older than the age of majority. (J.A. at 155.) Although Dr. Biro did identify three photographs that he believed depicted persons under the age of eighteen, this testimony conflicted with his earlier deposition testimony, in which he stated that none of the photographs he examined depicted minors. (J.A. at 127, 156-57.)

On January 16, 1997, approximately nine months after the date of the hearing, the district court denied Connection's motion for preliminary injunction. Although the district court's ruling primarily relied on its finding that Connection had not demonstrated a substantial likelihood of success on the merits, the court also found that the other factors for analyzing a request for a preliminary injunction did not weigh in favor of granting one. (J.A. at 27-30.)

Nonetheless, the district court granted Connection's motion for an injunction pending this appeal of the denial of the preliminary injunction. The district court concluded that, even though there was not a strong likelihood of success on the merits of the appeal, a stay of its order denying the preliminary injunction was warranted both because of the substantial legal questions involved in the case and because Connection would be irreparably harmed, in the form of its potential demise, if it were forced to comply with the statute during the pendency of the appeal. (J.A. at 37-38.) Accordingly, the district court issued an injunction barring the enforcement of the Act against Connection prior to the resolution of this appeal.

II. STANDARD OF REVIEW

In determining whether or not to grant a preliminary injunction, a district court considers four factors: (1) the plaintiff's likelihood of success on the merits; (2) whether the plaintiff could suffer irreparable harm without the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) the impact of the injunction on the public interest. *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 653 (6th Cir.), *cert. denied*, 117 S.Ct. 49 (1996). "None of these factors, standing alone, is a prerequisite to relief; rather, the court should balance them." *Id.* (citations omitted).

An appeals court reviews a challenge to a district court's ruling on a preliminary injunction for abuse of discretion. *Blue Cross & Blue Shield Mutual of Ohio v. Blue Cross and Blue Shield Ass'n*, 110 F.3d 318, 322 (6th Cir. 1997). "The district court's determination will be disturbed only if the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." *Id.*

When a party seeks a preliminary injunction on the basis of the potential violation of the First Amendment, the likelihood of success on the merits often will be the determinative factor. With regard to the factor of irreparable injury, for example, it is well-settled that "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality); *see also Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.") (citing *Elrod*). Thus, to the extent that Connection can establish a substantial likelihood of success on the merits of its First Amendment claim, it also has established the possibility of irreparable harm as a result of the deprivation of the claimed free speech rights. *See Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995).

Likewise, the determination of where the public interest lies also is dependent on a determination of the likelihood of success on the merits of the First Amendment challenge because "it is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994); *see also Dayton Area*, 70 F.3d at 1490 ("the public as a whole has a significant interest in . . . protection of First Amendment liberties"). Furthermore, although the government presumably would be substantially harmed if enforcement of a *constitutional* law aimed at fighting child pornography were enjoined, this determination, too, first requires a review of the merits of the claim.

Accordingly, because the questions of harm to the parties and the pubic interest generally cannot be addressed properly in the First Amendment context without first determining if there is a constitutional violation, the crucial inquiry often is, and will be in this case, whether the statute at issue is likely to be found constitutional. *Cf. Congregation Lubavitch v.*

City of Cincinnati, 923 F.2d 458, 460 (6th Cir. 1991) (noting, in its review of injunction requiring placement of menorah in public square, that because harm could be suffered by either party, and the public interest lies in the correct application of First Amendment principles, "our decision must turn on the likelihood of success on the merits").

III. CONSTITUTIONALITY OF SECTION 2257 AS APPLIED TO CONNECTION AND ITS READERS

A. Suppression of Free Speech

As a publisher of magazines containing sexually explicit visual depictions, Connection asserts that its First Amendment rights to publish and distribute constitutionally protected expression, as well as the rights of its advertisers to communicate with each other,[6] have been unconstitutionally suppressed as a result of the record-keeping and disclosure provisions of the Act. The protected nature of the expression involved in this case was not challenged before the district court and thus is not at issue. There is the possibility that the sexually explicit photographs published by Connection could be found constitutional because it is well-settled that "[s]exual expression which is indecent but not obscene is protected by the First Amendment," and hence subject to constitutional strictures.[7] *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). Furthermore, the Supreme Court specifically has held that "non-obscene, sexually explicit materials involving persons over the age of 17 are protected by the First Amendment." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994). Therefore, the photographs published by Connection are protected expression to the extent they feature adults engaged in non-obscene, sexually explicit conduct.[8]

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[6] Connection brings this action on behalf of itself and its advertisers. A litigant may raise a claim on behalf of a third party if the litigant can demonstrate that it has suffered a concrete, redressable injury, that it has a close relation with the third party, and that there exists some hindrance to the third party's ability to protect his or her own interests. *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 629 (1991). For the reasons explained in Part III.C, we conclude that Connection may properly assert the free speech and free association rights of its readers. *See* discussion *infra* Part III.C.

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[7] The standard for determining whether materials are obscene remains the same today as that set forth by the Supreme Court in *Miller v. California*, 413 U.S. 15 (1973):

> "(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state of law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.*, at 24, 93 S.Ct., at 2615 (internal quotation marks and citations omitted).

Reno v. American Civil Liberties Union, ___ U.S. ___, 117 S.Ct. 2329, 2345 (1997). Based upon the record and factual scenario before us, we need not decide, and have not decided, specifically whether any of the materials at issue are obscene. However, we will assume, but solely for the purpose of analyzing the record-keeping provisions at issue, that the materials are not obscene.

Photographs featuring children engaged in sexually explicit conduct, however, would not constitute protected expression. In *New York v. Ferber*, 458 U.S. 747, 764 (1982), the Supreme Court held that, as long as the activity to be prohibited is adequately defined and limited by applicable state law, child pornography -- defined generally as works that visually depict sexual conduct by children below a specified age -- is not entitled to First Amendment protection. In upholding a statute prohibiting the distribution of child pornography, the Court in *Ferber* noted that States are entitled to greater leeway in the regulation of child pornography because of the State's interest in preventing the sexual exploitation of children and in closing down the distribution network that generates the market for child pornography, which in turn leads to the abuse of children involved in the production of the materials. *Id.* at 757-59. The Court also has upheld a State's right to prohibit even the possession of child pornography. *See Osborne v.*

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[8] This does not mean that use or distribution of these materials would be protected in all contexts. The government presumably could, for example, prohibit the distribution of these materials, even though not obscene, to minors. *See Ginsberg v. New York*, 390 U.S. 629, 636-37 (1968). Additionally, the First Amendment also would not protect the right to engage in the depicted sexual conduct publicly under the theory that the sexual act itself constitutes protected expression. *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67 (1973). What is relevant for purposes of this case, however, is that the materials published by Connection are protected expression in the context of the record-keeping provisions at issue.

Ohio 495 U.S. 103, 111 (1990) ("[g]iven the gravity of the State's interests . . . we find that Ohio may constitutionally proscribe the possession and viewing of child pornography").

The goal of preventing the sexual exploitation of children undoubtedly is a compelling and important one, which the government not only is permitted but perhaps obliged to pursue. *See Ferber*, 458 U.S. at 757 (finding prevention of the sexual exploitation and abuse of children to be a government objective of "surpassing importance"). Recently Congress has further attempted to fight child pornography through the passage of the Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-26 (codified at 18 U.S.C. §2252A (Supp. II 1996)). This new statute, aimed at curbing the effects of computer technology upon the child pornography industry, broadens the scope of child pornography laws by making it illegal to possess or distribute, electronically or otherwise, child pornography and defining "child pornography" to include visual depictions, however generated or created, that feature minors, have been created or modified to appear to feature minors, or are marketed as featuring minors engaged in sexually explicit conduct. *See* 18 U.S.C. §2252A (Supp. II 1996) (incorporating definition of "child pornography" contained in 18 U.S.C. §2256(8) (Supp. II 1996)).[9]

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[9] Recently, this statute has been subjected to constitutional challenge, particularly on the basis that because the statute prohibits sexually explicit visual depictions of persons who only *appear* to be minors, it prohibits constitutionally protected

However, even in the pursuit of the most worthy of goals, the government may not unduly burden free speech. In determining whether the Act inappropriately hinders the exercise of the protected speech at issue, it is necessary first to determine whether the Act is content-based or content-neutral because that determination will decide the level of scrutiny.

> The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech.

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citations and internal quotations omitted).

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expression. *See United States v. Hilton*, No. Crim. 97-78-P-C, 1998 WL 167255 at *3-4 (D. Me. Mar. 30, 1998) (finding prohibition on pornography with child-like depictions to be content-neutral but striking the definition of "child pornography" on the basis of vagueness); *Free Speech Coalition v. Reno*, No. C 97-0281VSC, 1997 WL 487758 at *4, 6 (N.D. Cal. Aug. 12, 1997) (finding prohibition on child-like depictions content-neutral and sufficiently defined to withstand vagueness challenge).

The stated purpose of the original Child Protection and Obscenity Enforcement Act of 1988, which §2257 amended, was to alleviate the difficulty for law enforcement officers in ascertaining whether an individual in a film or other visual depiction is a minor for the purpose of combating child pornography. *See* 1 Attorney General's Commission on Pornography, *Final Report* 618-20 (July 1986) ("Final Report"). The Attorney General's Commission on Pornography reasoned that, because some pornographers deliberately use youthful-looking adult models, there needed to be a statute requiring producers of sexually explicit material to maintain records of age verification. *Id.* at 618. The Commission also concluded that minors deserve special protection from the risks inherent in the production of pornographic materials and, therefore, individuals should be prohibited from employing, using, persuading, inducing, or coercing any minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct. *Id.* at 618-19.

The government's goal of preventing child pornography through the record-keeping provisions of the Act clearly is not an attempt to regulate the speech of Connection and its advertisers because of disagreement with the messages they convey. Although the Act does require that the content of speech be examined to determine its applicability, the Act is not directed at the protected speech but rather unprotected conduct -- namely, child pornography -- that may be identified by the speech. Therefore, the fact that publishers or producers of sexually explicit visual depictions are, to some extent, treated differently from other types of producers of visual depictions does not make the Act content-based. *Cf. City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986) (finding that zoning ordinance restricting the placement of adult theaters was aimed at the secondary effects of such theaters on the surrounding community and thus was a content-neutral regulation despite the differing treatment received by adult theater owners as compared to other theater owners); *see also R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 389 (1992) (noting that a "valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular 'secondary effects' of the speech, so that the regulation is 'justified without reference to the content of the . . . speech'") (citations omitted). Thus, although the Act may not be content-neutral in a technical sense, because it is directed at curbing the secondary effects of the speech and not the speech itself, it is proper to deem it content-neutral for First Amendment purposes. *See Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 440 (6th Cir. 1998) (noting that regulations of sexually explicit speech which are aimed at its secondary effects are, in fact, content-based but merely are to be treated as content-neutral). The reason for this difference in treatment is that the Supreme Court has held that although sexually explicit expression is protected by the First Amendment, "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude" than the societal interest in other forms of expression, such as political debate. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (plurality). Accordingly, because §2257 is a regulation aimed at the secondary effects of sexually explicit speech, it is properly analyzed as a content-neutral regulation.

The intermediate level of scrutiny applies to content-neutral regulations that impose an incidental burden on speech. *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994). Under this standard, a government regulation is constitutional if the obligations it imposes are "narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791 (citation and internal quotations omitted).

With regard to the requirement of narrow tailoring, Connection argues that the Act burdens substantially more speech than is necessary to achieve its professed goal of combating child pornography. Although Connection acknowledges that the protection of children is a legitimate and substantial government interest, it claims that the Act's record-keeping provisions unnecessarily diminish the First Amendment rights of adults because the Act's goal is not furthered by the record-keeping provisions as applied to Connection and its readers.

It is true that the interest of protecting children may not always justify limitations on the First Amendment rights of adults, and the government is not excused from the tailoring requirement merely because the interests of children are involved. In *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 130-31 (1989), the Supreme struck down a total ban on indecent commercial telephone communications as not sufficiently justified by the government interest in preventing minors from being exposed to those messages. In balancing the interests at stake, the Court found that the statute's complete denial of adult access to telephone messages which are indecent but not obscene far exceeded that which was necessary to limit the access of minors to such messages. *Id.* at 131. Similarly, in *Reno v. American Civil Liberties Union*, ___ U.S. ___, 117 S.Ct. 2329 (1997), the Court invalidated provisions of an act designed to protect minors from harmful material on the Internet because the statute unnecessarily suppressed a broad amount of adult speech. *Id.* at 2346-48. Therefore, courts must weight the interests at stake in determining whether a statute impermissibly burdens free speech.

It is alleged by Connection that the vast majority of its advertisers are well over the age of majority. Nonetheless, a universal requirement of age disclosure, regardless of the apparent age of an individual in a visual depiction, is critical to the government's interest in ensuring that no minors are depicted in actual sexual conduct. Although standards based on "obvious" maturity would lead to accurate determinations in many cases, they also would attach an ineffectual subjectivity to the age determination, which was the target of the Act in the first place. *See Final Report* at 620 ("By viewing a visual depiction, how does one decide if the performer is fourteen or eighteen, seventeen or twenty-one?").

Furthermore, to satisfy the narrow tailoring requirement of the intermediate scrutiny test, a regulation need not be the least speech-restrictive means of achieving the government's interests. *Turner Broadcasting*, 512 U.S. at 662. All that is required for narrow tailoring is that the regulation does not burden substantially more speech than is necessary to further the government's legitimate interest. *Id.* If the government wishes to prevent the sexual exploitation of children through the production of child pornography, application of the record-keeping provisions to all producers of sexually explicit materials is necessary and not unduly burdensome.

In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the Supreme Court analyzed a zoning ordinance that prohibited adult motion pictures form locating within 1,000 feet of any residential zone. After noting that the ordinance did not ban adult theaters altogether, but merely put restrictions on their location, the Court upheld the ordinance under the intermediate scrutiny test. *Id.* at 52-54. The Court found that the ordinance represented a valid governmental response to the "admittedly serious problems" created by adult theaters and was not used as a "pretext for suppressing expression" but rather was an attempt to make some areas available for adult theaters and their patrons, while at the same time preserving the quality of life in the community at large. *Id.* at 54 (citations omitted).

The Act, like the ordinance at issue in *City of Renton*, also is a reasonable attempt to balance the free speech interests of Connection and its readers against the interest of the government in fighting child pornography. Child pornography is an "admittedly serious" problem, and the record-keeping provisions of the Act clearly are not a "pretext for suppressing expression." *See City of Renton*, 475 U.S. at 54. The provisions are a reasonable attempt to prevent the use of minors in pornographic materials. By requiring that age verification records be submitted and maintained, the provisions do not prohibit the sexually explicit speech at issue or unduly burden the opportunity of Connection and its readers to engage in the expression. Because the Act supports the government's interest in fighting pornography, while allowing Connection and its readers to exercise their free speech rights, it satisfies the requirement of narrow tailoring. *See Turner Broadcasting*, 512 U.S. at 662.

Similarly, the Act is not impermissibly overbroad. A statute is overbroad when it includes within its prohibitions activities that are constitutionally protected. *See Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972). Although the majority of Connection's readership may not be the object of the Act's focus, the allowance of exceptions to the disclosure requirements

-- presumably based on a subjective determination by Connection as to a subscriber's age -- would not promote the Act's goal of eliminating the use of minors in pornography.

Connection also argues that the Act unconstitutionally chills protected speech. A statute may be stricken as unconstitutional under the First Amendment if it has a substantial chilling effect upon protected speech. *See, e.g. Reno,* 117 S.Ct. at 2345 (explaining that the vagueness of the Communication Decency Act and the severity of its criminal sanctions "may well cause speakers to remain silent rather than communication even arguably unlawful words, ideas, and images"). Connection contends, based primarily on anecdotal evidence and supposition, that the potential of their identifying information being disclosed to the government will chill its advertisers from exercising their right to publish sexually explicit photographs and will result in the self-censorship of their speech.

The Supreme Court "consistently has refused to allow government to chill the exercise of constitutional rights by requiring disclosure of protected, but sometimes unpopular, activities." *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747, 767 (1986) (striking down reporting requirements of Pennsylvania abortion law where records would be available to public), *overruled on other grounds by Planned Parenthood of Southeastern Pa v. Casey,* 505 U.S. 833 (1992). In this case, however, the provisions at issue do not require the disclosure of any information about the subscribers to the public. The Act does not constitute an impermissible "chill" on the exercise of free speech rights because it clearly does not contemplate public release of the information or "raise the specter of public exposure and harassment" of "swingers" who choose to express themselves through Connection's publications. *Thornburgh*, 476 U.S. at 767; *cf. Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 79-81 (1976) (upholding constitutionality of mandatory abortion records that were accessible only to public health officers).

All of the preceding relates to the requirement that a content-neutral regulation of speech be "narrowly tailored." This requirement is satisfied "'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Ward*, 491 U.S. at 799 (1989) (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). The Act complies with this requirement and is neither overbroad nor an impermissible chill on free expression because, as explained above, the government's interest in eliminating child pornography would be less effectively promoted without the record-keeping and disclosure requirements.

Connection also argues that the Act does not comply with the part of the intermediate scrutiny test which requires that a regulation of protected expression leave open "ample alternative channels" for the communication. Related to this argument is the contention that the regulation interferes with the rights of Connection's readers to express themselves anonymously. Connection contends that a person wishing to publish a sexually explicit message without submitting identification documents that may be made available to the government no longer has a forum where he or she can publish that message anonymously.

Connection is correct that the Supreme Court has recognized that the right to communicate anonymously is encompassed within the First Amendment. In *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), the Court struck down an ordinance prohibiting the anonymous distribution of political leaflets. The Court noted that "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." *Id.* at 342. Nonetheless, Connection's and its readers' First Amendment rights have not been violated.

First, Connection has defined the relevant channel of communication too narrowly. Connection claims that what is destroyed by the Act is a channel for anonymous, sexually explicit visual expression that does not require the submission of identification documents. However, the requirement that ample alternative channels be left available does not mean that there must be a channel where Connection and its readers can express themselves in precisely the same manner as before the regulation. *Cf. Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981) (noting that "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired"). Indeed, if there were an identical channel available for the communication, there likely would be no constitutional challenge.

If the relevant channel instead is defined merely as a forum for anonymous, sexually explicit visual expression, alternative channels clearly remain available. People who wish to submit sexually explicit photographs to Connection's magazines still may do so. These persons also may have their photographs *published* anonymously. All that has been restricted is their ability to *submit* their photographs without identification but not their right to express themselves, via their advertisements, anonymously. In point of fact, Connection's subscribers already were required to identify themselves and verify their ages to the magazines' editor. All that has changed is that documentation of age is required, and this information must be made available to the government if requested. Public disclosure of this information is neither required nor suggested by the terms of the Act. This condition of entry to this forum for anonymous, sexually explicit speech does not destroy the forum. Even assuming *arguendo* that Connection's readers will be less likely to engage in this form of expression because of the fear of disclosure, this unsubstantiated fear, and not the act, is what is diminishing the forum. *See Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 60 (1989) ("mere assertion of some possible self-censorship resulting from a statue is not enough to render . . .[a] law unconstitutional").

In addition, this fear of disclosure argument is weakened by the fact that Connection's readers already have placed themselves at risk of losing the anonymity of their speech by submitting sexually explicit photographs of themselves to be published and distributed in Connection's magazine. Even if the majority of Connection's advertisers do ask to have their faces blocked out of the advertisements and identify themselves only through the code at the beginning of each message, they still are subjecting themselves to potential disclosure because anyone may respond to the advertisement and then discover the advertisers' identities. Likewise, advertisers already have been disclosing their identities to Connection, which could also subject them to at least some risk of public disclosure.

Furthermore, defining the forum even more broadly indicates that there are numerous "reasonable alternative avenues of communication" available for sexually explicit expression. *See City of Renton*, 475 U.S. at 53 (finding zoning ordinance which prohibited adult motion pictures from locating near residential zones left ample land available for theaters in other areas). Undocumented sexually explicit expression is permitted if the acts of sexual conduct are simulated or do not otherwise fall within the proscriptions of the Act. Obviously, documentation also is not required for photographs of subscribers who are merely nude, fully clothed, or submit text-only messages. Connection's subscribers also may make use of its voice mailboxes for "swingers" and its service on the Internet. Therefore, subscribers who wish to engage in sexually explicit expression, without submitting documentation, still have alternative channels of communication available. Because the regulation at issue does not restrict the quantity or content of the expression, in the absence of any showing that the remaining channels of communication are inadequate, the requirement for alternative channels has been met. *See Ward*, 491 U.S. at 802. Therefore, as applied in this case, the Act does not impermissibly burden Connection's or its subscribers' free speech rights.

B. Prior Restraint

Connection argues that the Act operates as a prior restraint because advertisers must comply with the record-keeping provisions before they can publish their expression. Typically, "[t]he term prior restraint is used to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (citation and internal quotations omitted). Unlike this case, a prior restraint usually is alleged where a public official has been given discretionary power to deny use of a forum in advance of actual expression. *See Ward*, 491 U.S. at 795 n.5 (noting that most prior restraint cases have public officials with the power of pre-approval in common). Connection and its subscribers are not being forbidden from engaging in expressive activity in the future, but rather they potentially are being subjected to sanctions *following* their expressive activity – but only if they subsequently are found guilty of violating the record-keeping provisions. Because there is a "well-established distinction between prior restraints and subsequent criminal punishments," *Alexander*, 509 U.S. at 548, the Act does not constitute a prior restraint. In addition, for the reasons discussed above, the Act does not constitute a prior restraint because of any alleged self-censorship or "chilling effect" that it may have on Connection's readers.

C. Freedom of Association

Connection argues that the Act violates the free association rights of its member by inhibiting their right to publish sexually explicit messages seeking to associate with others of like beliefs without coming forward and identifying themselves.

The first issue to address is whether Connection has *jus tertii*, or right of a third party, standing to assert this right of freedom of association on behalf of its readers. Although generally a party may not assert rights or interests of third parties, there are exceptions to this rule. *See Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 629 (1991). A litigant may raise a claim on behalf of a third party if the litigant can demonstrate that it has suffered a concrete, redressable injury, that it has a close relation with the third party, and that there exists some hindrance to the third party's ability to protect his or her own interests. *Id.* Because Connection's own free speech rights are implicated, and it is directly subject to the strictures of the Act, Connection may challenge the Act on behalf of its readers, who are affected by the regulation of Connection's activities. *See Craig v. Boren*, 429 U.S. 190, 195 (1976) ("vendors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function"); *accord Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1394 (6th Cir. 1987).

Furthermore, even if Connection were attempting solely to assert its readers' rights and not its own, *jus tertii* standing would be appropriate under the facts of this case. When determining whether a party may assert the constitutional rights of others, a court must consider: (1) whether the relationship of the litigant to the third party is such that the litigant is an effective proponent of the rights of the third party; and (2) whether the third party is hindered in its ability to assert its own rights. *Singleton v. Wulff*, 428 U.S. 106, 114-16 (1976); *Planned Parenthood Ass'n of Cincinnati, Inc.*, 822 F.2d at 1394. In the present case, Connection properly may assert the First Amendment rights of its readers to remain anonymous in their speech and to freely associate with one another. Because a right to anonymity is at issue, "[t]o require that [the right] be claimed by the [readers] themselves would result in nullification of the right at the very moment of its assertion." *NAACP v. Alabama*, 357 U.S. 449, 459 (1958) (finding that NAACP could assert the right of its rank-and-file members not to be identified). Accordingly, Connection may assert the rights of its readers.

Freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of freedom of speech. *NAACP*, 357 U.S. at 460. This freedom may be threatened if there is forced disclosure of an individual's membership in an organization. In *NAACP v. Alabama*, the Supreme Court held that the NAACP could not be forced to disclose its membership lists to the State of Alabama because disclosure would adversely affect the ability of its members to collectively advocate and associate due to the fear of reprisals resulting from this disclosure. *Id.* at 462-63. The position of Connection's readership, however, is not analogous to that of the NAACP members. In NAACP, the Court noted the fact that the organization had made an uncontroverted showing that reprisals had occurred in the past when identity of the members had been disclosed. *Id.* at 462. Although Connection presented testimony that "swingers" have suffered reprisals when their lifestyles have been discovered by their communities, there has been no evidence offered that they will suffer reprisals from this information being disclosed only to the government.

Perhaps more importantly, Connection's readers' freedom to associate by means of its magazines is not significantly hindered by the Act. The readers still may associate freely and anonymously by submitting numerous types of messages and pictures for publication without providing documentation of name or age. Clearly, the right of the readers to freely associate with like-minded persons is not infringed by the presence of a record-keeping provision that applies only to a highly specific form of expression and requires potential disclosure only to the government. Accordingly, the free association rights of Connection's readers have not been violated.

IV. CONCLUSION

Accordingly, it is clear that Connection has not demonstrated a substantial likelihood of success on the merits of its claim that the Act and its implementing regulations violate the First Amendment rights of Connection and its readers.[10] In addition, the other factors relevant to the granting of a preliminary injunction weigh against Connection's motion. The public has a strong interest in the enforcement of a likely constitutional statute would harm the government. Furthermore, Connection has not demonstrated that it will be irreparably injured absent the granting of an injunction. Accordingly, the district court did not abuse its discretion, and we hereby **AFFIRM** the district court's denial of the preliminary injunction and **VACATE** the stay pending appeal.

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[10] In analyzing the Act under a similar constitutional attack, the District of Columbia Circuit likewise has concluded that the aspect of the record-keeping provisions at issue in this case does not violate the First Amendment. *See American Library Ass'n v. Reno*, 33 F.3d 78 (D.C. Cir. 1994).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CONNECTION) CASE NO. 1:95CV1993
DISTRIBUTING CO.)
)
Plaintiff,)
)
v.) Judge John M. Manos
)
THE HONORABLE) MEMORANDUM OF
JANET RENO,) OPINION
)
Defendant,)
) (Filed Jan. 16, 1997)

On September 13, 1995, Connection Distributing Company ("Connection"), plaintiff, filed the above captioned action against United States Attorney General Janet Reno, defendant, seeking declaratory and injunctive relief to prohibit enforcement of the Child Protection Restoration and Penalties Enhancement Act of 1990,[11] 18 U.S.C. §2257. Jurisdiction is predicated upon 28 U.S. C. §1331.

On September 13, 1995, Connection filed a Motion for Preliminary Injunction and requested an evidentiary hearing. On April 8 and 9, 1996, the Court held an evidentiary hearing at which witnesses and exhibits were presented. For the following reasons, the motion is DENIED.

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[11] Title III of the Crime Control Act of 1990. Pub. L. No. 101-647. 104 Stat. 4789 (codified at 18 U.S.C. §2257(1990)).

I. FACTS

A. Background Information

Connection is a Cleveland corporation that publishes sexually explicit "swinger" magazines.[12] The magazines consist, *inter alia*, of advertisements placed by individuals seeking to meet others in the swinging lifestyle. The ads, generally containing the author's biographical information, personal facts, and an identification number, are often accompanied by one or more explicit photographs. Individuals who wish to respond to an ad may submit a letter to Connection which, for a handling fee, will forward the correspondence to the person who placed the ad (the "author"). In this fashion, the identity of the author remains confidential.[13]

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[12] According to Patricia Prementine, Editor of Connection and a self-proclaimed swinger, "swinging" is "an alternative social and sexual lifestyle comprised mostly of mature adults who believe in sexual freedom and do not believe in sexual monogamy. [Swingers] allow their partners the freedom to experience sexual relationships with others." (Transcript at 4).

[13] While the identity of the author is not known to the general public, Connection has always required a person who wishes to place a personal ad to supply his or her legal name, address, and telephone number, and to affirm that he or she is over the age of twenty-one. See Plaintiff's Exhibit 9; see also Transcript at 17-18.

In 1990, Congress, in response to the difficulties faced by law enforcement officials in ascertaining the age of individuals contained in sexually explicit visual depictions, passed the Child Protection Restoration and Penalties Enhancement Act ("Act"), 18 U.S.C. §2257. The Act requires producers of material containing visual depictions of "actual sexually explicit conduct"[14] to create and maintain records concerning the identity and age of all performers depicted.[15] 18 U.S.C. §2257(a). Producers must ascertain and record each performer's name (including any professional name, nickname, or alias used by such person) and date of birth. 18 U.S.C. §2257(b); see 28 C.F.R. §75.2(a). In addition, a legible copy of an identification document (*e.g.*, driver's license, passport, or state identification card) must be kept verifying the personal information of each performer. 28 C.F.R. §75.2(a)(1). Producers must maintain these records at their business premises and are required to make them available to the Attorney General for inspection at all reasonable times. 18 U.S.C. §2257(c); see 28 C.F.R. §§75.4 and 75.5. Further, each book, magazine, periodical, film or videotape covered by the Act must contain a conspicuous statement of the address at which the records are kept. 18 U.S.C. §2257(e); see 28 C.F.R. §75.6. Any producer who does not comply with the Act is subject to a fine and imprisonment for up to two years. 18 U.S.C. §2257(i).[16]

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[14] "Actual sexually explicit conduct" is defined as actual (*i.e.*, not simulated) "(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between two person of the same or opposite sex; (B) bestiality; (C) masturbation; or (D) sadistic or masochistic abuse." 18 U.S.C. §2257(h)(1) (incorporating by reference 18 U.S.C. §2256(2)(A)-(D)).

[15] The Act applies equally to "primary" and "secondary" producers. 18 U.S.C. §2257(h)(3). The regulations define a "primary producer" as "any person who actually films, videotapes, or photographs a visual depiction of actual sexually explicit conduct," whereas a "secondary producer" is "any person who produces, assembles, manufactures, publishes, duplicates, reproduces or reissues a book, magazine, periodical, film, videotape or other matter intended for commercial distribution that contains a visual depiction of actual sexually explicit conduct." 28 C.F.R. §75.1(c)(1) and (2).

On September 13, 1995, Connection filed the above captioned action seeking declaratory and injunctive relief to prohibit enforcement of the Act. Count One alleges that the Act, as applied to Connection, violates the First Amendment, in that it (a) suppresses free speech; (b) represents a prior restraint; (c) chills protected speech; and (d) is overbroad. In Count Three, Connection invokes the theory of "associational standing" and asserts the same constitutional violations on behalf of those persons who wish to place personal ads. See e.g., N.A.A.C.P. v. Alabama, 357 U.S. 449, 458-60 (1957) (organization has standing to assert the constitutional rights of its members where sufficient nexus of interests exists).[17]

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[16] Repeat offenders may be imprisoned for up to five years. 18 U.S.C. §2257(i).

[17] Counts Two and Four merely restate the allegations of Counts One and Three, respectively, and request that the Court order declaratory and injunctive relief.

B. Evidence Presented at the Hearing

On April 8 and 9, 1996, the Court held an evidentiary hearing on the Motion for Preliminary Injunction. Both parties called witnesses and introduced exhibits into evidence.

Patricia Prementine, Editor of Connection for twelve years, testified that since 1986, Connection has only published personal advertisements for persons over twenty-one years of age. (Transcript at 17.) Individuals wishing to submit ads must affirm, under penalty of perjury, that they are over twenty-one years of age and sign the back of each photograph submitted. (Id. at 17-18.) Upon receipt, she reviews the completed advertisement placement form, any photographs, the proposed text of the ad, and the method of payment to ensure that the person submitting the ad is over twenty-one. (Id. at 18.) If she has any doubt as to an individual's age, she requests further identification information to verify his or her age.[18] (Id. at 19.)

In January 1995, Connection began its effort to comply with the statutory and regulatory mandates of the Act.[19] (Id. at 23.) It sent a letter to its readership, entitled "Important Notice to Advertisers," in which it explained that readers wishing to submit sexually explicit photographs were now required to submit a legible copy of (1) a driver's license, state identification card, or passport; and (2) a second form of identification, such as a social security card or an insurance card. (Id. at 23-25; see Plaintiff's Exhibit 11.) Connection also modified its form for placing a personal ad to include information required under the Act. (Transcript at 24; see Plaintiff's Exhibit 10.)

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[18] Prementine testified that she reviewed all photographs submitted, not merely those that were published, and thus had adequate opportunity to verify the age of the person depicted. In addition, she stressed that she reviewed the photographs before they were scanned; *i.e.*, the submissions she viewed were clearer and of a higher quality than they appeared after scanning and publication. (Id. at 18, 21.)

Connection alleges that as a result of these compliance attempts, the number of submissions to its magazines drastically declined. (Transcript at 26.) Prementine testified that prior to January 1995, Connection customarily received between one hundred to two hundred submissions per issue.[20] (Id. at 22.) In contrast, since July 1995 to present date, Connection received only 137 submissions with proper identification to be distributed throughout the 34 issues published.[21] (Id. at 27.) Prementine claimed that Connection was forced to drop two of its magazines, and to "recycle" old ads in the remaining six titles. (Id. at 29.) Further, Connection eliminated most of the color pages, reduced the size of its magazines, increased the amount of commercial advertising, and otherwise reduced quality in order to save costs resulting from the drop in submission. (Id. at 30.) Prementine opined that this drop in submission was "due to the fact that [the] readership is so terrified of being exposed," and concluded that Connection could not survive if it continued to comply with the Act. (Id. at 28, 32.)

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[19] Originally passed in 1990, the Act was subject to immediate constitutional attack, and remained so for years of protracted litigation. See American Library Ass'n v. Thornburgh, 713 F.Supp. 469 (D.D.C. 1989) (holding prior version of Act unconstitutional), vacated sub nom. American Library Ass'n v. Barr, 956 F.2d 1178 (D.C. Cir. 1992) (vacating judgment in light of new amendment), on remand, 794 F.Supp. 412 (D.D.C. 1992) (holding Act with new amendments unconstitutional), rev'd sub nom. American Library Ass'n v. Reno, 33 F.3d 78 (D.C. Cir. 1994) (reversing district court and finding Act constitutional), cert. denied, 115 S.Ct. 2610 (1995). Accordingly, Connection did not attempt to comply with the Act until its validity had been upheld and the Attorney General put publishers on notice that it intended to begin enforcement efforts.

[20] Prior to 1995, Connection published eight sexually explicit magazines on a bimonthly or quarterly basis (depending

Connection's only other witness was Robert L. McGinley, an "expert" in the swinging lifestyle.[22]

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on title). (Id. at 14-16.)

[21] Prementine also testified that in July 1995, Connection was forced to "black out" portions of 477 explicit photographs in its magazines because it did not have proper identification for those depicted. (Id. at 26.) Connection sent out letters to those who placed the ads and requested the necessary documentation. (Id.) Of the 477 letters sent, Connection to date received only 30 responses. (Id. at 27.) Prementine testified that this lack of response (taken in conjunction with the decline in submissions) was evidence that swingers, fearful of exposing their identities to the government, were engaging in self-censorship. (Id. at 28.)

[22] McGinley holds a Masters and Doctorate Degree in counseling psychology from Newport International University, although he never became licensed in, nor pursued the profession

McGinley, chief executive officer of L.S.O., Limited, a California corporation that caters to swingers, testified that privacy is of "paramount importance" to those engaged in the lifestyle. (Id. at 139.) After recounting a personal experience when he allegedly lost his job due to "swinging,"[23] he claimed that swingers generally fear governmental exposure and intervention. (Id. at 140.) He testified that based upon his personal experience at least 90% of swingers are over the age of thirty, although some are in their twenties.[24] Finally, he concluded that the "great majority" of swingers, due

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of. psychology. (Id. at 126.) He has been involved in the corporate aspects of swinging since 1969. but personally engaged in the lifestyle prior to that. (Id. at 127.) He is co-author of the book The Other Americans with Dr. Edgar W. Butler, Chairman of the Department of Psychology at the University of California Riverside Campus. (Id. at 133.) In addition, McGinley has authored numerous articles for national magazines. has appeared on several hundred television and radio programs on the subject of "swinging," and has had personal contact with swingers throughout the country for the past twenty to twenty-five years. (Id. at 135.)

[23] In 1969, McGinley was employed by Bendix Corporation as a Senior Service Engineer, where he taught United States military airlift command pilots to use the automatic landing system on the Landheed C141A aircraft. As part of his job, he had government security clearance. While working at Bendix, he answered an advertisement in a swingers magazine and began corresponding through sexually explicit letters with a woman in northern California, who he later found out was married to a United States Air Force Sergeant. McGinley testified that the Air Force, through means unknown, obtained one of the letters he had written and voided his security clearance, preventing him from working. (Id. at 128-29.)

[24] He also testified that he had never seen or heard of a minor engaging in the "swinging" lifestyle. (Id. at 139.)

to their fear of governmental reprisal, would cease publishing advertisements if forced to comply with the identification mandates of the Act. (Id. at 142.)

The government's sole witness was Dr. Frank M. Biro, M.D., a specialist in the Adolescent Medicine Division at Children's Hospital Medical Center in Cincinnati.[25] Dr. Biro testified that he had reviewed six magazines published by Connection in 1994 and identified three photographs where the person depicted could be under the age of eighteen. (Id. at 87.) He further testified that several photographs provided insufficient visual clues to determine the age of the individual. (Id. at 93-94.)

On cross-examination, Connection highlighted several inconsistencies between Dr. Biro's testimony at the hearing and the conclusions contained in his expert report. (Id. at 99-115.) In addition, Dr. Biro acknowledged that the field of pubertal maturation was not an exact science and was not studied to ascertain the age of an individual. (Id. at 98.) Finally, Connection elicited that Dr. Biro, when reviewing the magazines, had mistakenly thought that the legal age of majority was twenty-one rather than eighteen. (Id. at 99-100.)

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[25] Dr. Biro is the Director of Clinical Affairs in the Division of Adolescent Medicine. He also is the Director of the combined internal medicine/pediatrics residency program. He co-authored a recent growth and health study for the National Heart, Lung and Blood Institute and has published numerous articles in peer review journal on the subject of pubertal maturation. (Id. at 70-80.)

II. STANDARD OF REVIEW

In determining whether to grant a motion for preliminary injunction, the Court considers four factors:

> (1) the likelihood that the parties seeking the preliminary injunction will succeed on the merits of the claim; (2) whether the party seeking the injunction will suffer irreparable harm without the grant of the extraordinary relief; (3) the probability that granting the injunction will cause substantial harm to others; and (4) whether the public interest is advanced by the issuance of the injunction.

Dayton Area Visually Impaired Persons, Inc. v. Fisher, 70 F.3d 1474, 1480 (6th Cir. 1995) (quoting Washington v. Reno, 35 F.3d 1093, 1099 (6th Cir. 1994)), cert. denied, 116 S.Ct. 1421 (1996). All four factors need not support the decision. Women's Medical Professional Corp. v. Voinovich, 911 F.Supp. 1051, 1059 (S.D. Ohio 1995). Rather, the factors are intended to help guide the Court in balancing the equities of the case. In re Eagle-Picher Indus., Inc., 963 F.2d 855, 859 (6th Cir. 1992).

III. ANALYSIS

Connection has not established a substantial likelihood of success on the merits. Despite repeated challenges,[26] the Act has been upheld against similar constitutional attack. American Library Ass'n v. Reno ("ALA"), 33 F.3d 78 (D.C. Cir. 1994), cert. denied, 115 S.Ct. 2610 (1995). In ALA, the United States Court of Appeals for the District of Columbia Circuit held that the Act was a content-neutral, narrowly tailored statute that passed constitutional muster. Id. at 84-88. Nothing in the evidence leads this Court to conclude that this decision should be distinguished.[27]

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[26] See supra n.9.

[27] This conclusion holds true even in light of the additional authority offered by Connection. On June 28, 1996, Connection filed a Motion for Leave to File Supplemental Authority, offering the decision of ACLU v. United States, 929 F. Supp. 824 (E.D. Pa. 1996). On July 23, 1996, Connection filed a Second Motion for Leave to File Supplement Authority, offering the recent Supreme Court decision of Denver Area Telecommunication Consortium, Inc. v. FCC, 116 S.Ct 2374 (1996). The government opposed both motions.

For purposes of the record, both motions are hereby granted. The Court has considered the above decisions in reaching its decision. Both the ACLU and Denver decisions can be readily distinguished. The most obvious distinction is that different statutes were reviewed: The ACLU court struck down a portion of the Communications Decency Act of 1996, 110 Stat. 56 (to be codified at 47 U.S.C. §223(a)-(h)), legislation aimed at prohibiting, *inter alia*, the dissemination of "indecent" or "patently offensive" materials to minors over the computer internet; and in Denver, the Court reviewed the constitutionality of the Cable Television Consumer Protection Act of 1992, 106 Stat. 1486, §10(a)-(c) (codified at 47 U.S.C. §532(h)-(j)), a statute concerning "indecent" or "patently offensive" programming on cable systems. Neither statute was designed to address the problem of child pornography, as was the Act here, and neither court had reason to review recordkeeping requirements or any analogous provision to those here at issue. Further, Connection cannot point to a rule of law established by ACLU or Denver, for neither decision

Connection has indeed demonstrated a significant decline in submissions to its magazines following its attempts to comply with the Act. However, even assuming *arguendo* a causal relationship between the two (*i.e.*, that the compliance efforts proximately caused the drop in submissions), the possibility of "self-censorship" is not enough to render a statute unconstitutional. Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 60 (1989). Moreover, Connection's argument that its own internal procedures ensure that minors are not depicted in its magazines is misplaced. The evidence presented at the hearing demonstrates the subjective and imprecise nature of determining a person's age from looking at a number of photographs.[28] More importantly, in deciding whether a statute is prohibited by the First Amendment, the Court must determine whether the statute is

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provides a majority opinion. In ACLU, each of the three panel judges found the Act to be unconstitutional; however, each so found for different independent reasons and each wrote a separate opinion. Similarly, Denver represents a plurality decision, with six Justices writing separately, and even the plurality could not agree on the appropriate level of scrutiny to apply to the Act.

The Court finds that, even in light of the ACLU and Denver decisions, Connection has not shown a likelihood of success on the merits.

[28] At the hearing, Connection, in an attempt to discredit the government's expert, established that the field of pubertal maturation is not an exact science and cannot be used to predict the age of individuals. If Dr. Biro, a specialist who has performed hundreds of physical examinations on adolescents, cannot determine the age of a person by examining a photograph, the Court questions how Prementine, without any formal training in biology or human development, can effectively "screen" submissions to ensure that no minors are depicted.

sufficiently tailored in relation to the overall problem legislated against (here, child pornography), not whether the statute is sufficiently tailored with regard to a single operation. See Ward v. Rock Against Racism, 491 U.S. 781, 801 (1989). Thus, even were Connection's internal procedures guaranteed to prevent the depiction of minors in its magazines, the analysis would not change.

As to the second factor, while Connection has demonstrated economic loss, it has not shown a constitutional violation that would constitute irreparable harm. The government would be substantially harmed if enforcement of a constitutional law aimed at combating child pornography were enjoined, and the public interest dictates that constitutional laws be applied.

Accordingly, Connection's Motion for a Preliminary Injunction is DENIED.

IT IS SO ORDERED.

/s/ John M. Manos
United States District Judge

U. S. Const., Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Effective: April 30, 2003

United States Code Annotated Currentness
  Title 18. Crimes and Criminal Procedue (Refs & Annos)
    Part I. Crimes
      Chapter 110. Sexual Exploitation and Other Abuse of Children (Refs & Annos)

§ 2257. Record keeping requirements

(a) Whoever produces any book, magazine, periodical, film, videotape, or other matter which –

> (1) contains one or more visual depictions made after November 1, 1990 of actual sexually explicit conduct; and
>
> (2) is produced in whole or in part with materials which have been mailed or shipped in interstate or foreign commerce, or is shipped or transported or is intended for shipment or transportation in interstate or foreign commerce;

shall create and maintain individually identifiable records pertaining to every performer portrayed in such a visual depiction.

(b) Any person to whom subsection (a) applies shall, with respect to every performer portrayed in a visual depiction of actual sexually explicit conduct –

(1) ascertain, by examination of an identification document containing such information, the performer's name and date of birth, and require the performer to provide such other indicia of his or her identity as may be prescribed by regulations;

(2) ascertain any name, other than the performer's present and correct name, ever used by the performer including maiden name, alias, nickname, stage, or professional name; and

(3) record in the records required by subsection (a) the information required by paragraphs (1) and (2) of this subsection and such other identifying information as may be prescribed by regulation.

(c) Any person to whom subsection (a) applies shall maintain the records required by this section at his business premises, or at such other place as the Attorney General may by regulation prescribe and shall make such records available to the Attorney General for inspection at all reasonable times.

(d)(1) No information or evidence obtained from records required to be created or maintained by this section shall, except as provided in this section, directly or indirectly, be used as evidence against any person with respect to any violation of law.

(2) Paragraph (1) of this subsection shall not preclude the use of such information or evidence in a

prosecution or other action for a violation of this chapter or chapter 71, or for a violation of any applicable provision of law with respect to the furnishing of false information.

(e)(1) Any person to whom subsection (a) applies shall cause to be affixed to every copy of any matter described in paragraph (1) of subsection (a) of this section, in such manner and in such form as the Attorney General shall by regulations prescribe, a statement describing where the records required by this section with respect to all performers depicted in that copy of the matter may be located.

(2) If the person to whom subsection (a) of this section applies is an organization the statement required by this subsection shall include the name, title, and business address of the individual employed by such organization responsible for maintaining the records required by this section.

(f) It shall be unlawful –

(1) for any person to whom subsection (a) applies to fail to create or maintain the records as required by subsections (a) and (c) or by any regulation promulgated under this section;

(2) for any person to whom subsection (a) applies knowingly to make any false entry in or knowingly to fail to make an appropriate entry in, any record required by subsection (b) of this section or any

regulation promulgated under this section;

(3) for any person to whom subsection (a) applies knowingly to fail to comply with the provisions of subsection (e) or any regulation promulgated pursuant to that subsection; and

(4) for any person knowingly to sell or otherwise transfer, or offer for sale or transfer, any book, magazine, periodical, film, video, or other matter, produce in whole or in part with materials which have been mailed or shipped in interstate or foreign commerce or which is intended for shipment in interstate or foreign commerce, which–

(A) contains one or more visual depictions made after the effective date of this subsection of actual sexually explicit conduct; and

(B) is produced in whole or in part with materials which have been mailed or shipped in interstate or foreign commerce, or is shipped or transported or is intended for shipment or transportation in interstate or foreign commerce;

which does not have affixed thereto, in a manner prescribed as set forth in subsection (e)(1), a statement describing where the records required by this section may be located, but such person shall have no duty to determine the accuracy of the contents of the statement or the records required to be kept.

(g) The Attorney General shall issue appropriate regulations to carry out this section.

(h) As used in this this section –

(1) the term "actual sexually explicit conduct" means actual but not simulated conduct as defined in subparagraphs (A) through (D) of paragraph (2) of section 2256 of this title;

(2) "identification document" has the meaning given that term in section 1028(d) of this title;

(3) the term "produces" means to produce, manufacture, or publish any book, magazine, periodical, film, video tape, computer generated image, digital image, or picture, or other similar matter and includes the duplication, reproduction, or reissuing of any such matter, but does not include mere distribution or any other activity which does not involve hiring, contracting for managing, or otherwise arranging for the participation of the performers depicted; and

(4) the term "performer' includes any person portrayed in a visual depiction engaging in, or assisting another person to engage in, actual sexually explicit conduct.

(i) Whoever violates this section shall be imprisoned for not more than 5 years, and fined in accordance with the provisions of this title, or both. Whoever violates this section after having been convicted of a violation punishable under this section shall be imprisoned for any period of years not more than 10 years but not less than 2 years, and fined in accordance with the provisions of this title, or both.

PART 75—CHILD PROTECTION RESTORATION AND PENALTIES ENHANCEMENT ACT OF 1990 AND RECORD-KEEPING AND RECORD-INSPECTION PROVISIONS

Sec.
75.1 Definitions.
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AUTHORITY: 18 U.S.C. 2257.

SOURCE: Order No. 2765-2005, 70 FR 29619, May 24, 2005, unless otherwise noted.

§ 75.1 Definitions.

(a) Terms used in this part shall have the meanings set forth in 18 U.S.C. 2257, and as provided in this section. The terms used and defined in these regulations are intended to provide common-language guidance and usage and are not meant to exclude technologies or uses of these terms as otherwise employed in practice or defined in other regulations or federal statutes (i.e., 47 U.S.C. 230, 231).

(b) *Picture identification card* means a document issued by the United States, a State government or a political subdivision thereof, or a United States territory, that bears the photograph and the name of the individual identified, and provides sufficient specific information that it can be accessed from the issuing authority, such as a passport, Permanent Resident Card (commonly known as a "Green Card"), or other employment authorization document issued by the United States, a driver's license issued by a State or the District of Columbia, or another form of identification issued by a State or the District of Columbia; or, a foreign government-issued equivalent of any of the documents listed above when both the person who is the subject of the picture identification card and the producer maintaining the required records are located outside the United States.

(c) *Producer* means any person, including any individual, corporation, or other organization, who is a primary producer or a secondary producer.

(1) A *primary producer* is any person who actually films, videotapes, photographs, or creates a digitally- or computer-manipulated image, a digital image, or picture of, or digitizes an image of, a visual depiction of an actual human being engaged in actual sexually explicit conduct.

(2) A *secondary producer* is any person who produces, assembles, manufactures, publishes, duplicates, reproduces, or reissues a book, magazine, periodical, film, videotape, digitally- or computer- manipulated

image, picture, or other matter intended for commercial distribution that contains a visual depiction of an actual human being engaged in actual sexually explicit conduct, or who inserts on a computer site or service a digital image of, or otherwise manages the sexually explicit content of a computer site or service that contains a visual depiction of an actual human being engaged in actual sexually explicit conduct, including any person who enters into a contract, agreement, or conspiracy to do any of the foregoing.

(3) The same person may be both a primary and a secondary producer.

(4) Producer does not include persons whose activities relating to the visual depiction of actual sexually explicit conduct are limited to the following:

(i) Photo or film processing, including digitization of previously existing visual depictions, as part of a commercial enterprise, with no other commercial interest in the sexually explicit material, printing, and video duplicators;

(ii) Mere distribution;

(iii) Any activity, other than those activities identified in paragraphs (c) (1) and (2) of this section, that does not involve the hiring, contracting for, managing, or otherwise arranging for the participation of the depicted performers;

(iv) A provider of web-hosting services who does not, and reasonably cannot, manage the sexually explicit content of the computer site or service; or

(v) A provider of an electronic communication service or remote computing service who does not, and reasonably cannot, manage the sexually explicit content of the computer site or service.

(d) *Sell, distribute, redistribute, and re-release refer* to commercial distribution of a book, magazine, periodical, film, videotape, digitally- or computer-manipulated image, digital image, picture, or other matter that contains a visual depiction of an actual human being engaged in actual sexually explicit conduct, but does not refer to noncommercial or educational distribution of such matter, including transfers conducted by bona fide lending libraries, museums, schools, or educational organizations.

(e) *Copy*, when used:

(1) In reference to an identification document or a picture identification card, means a photocopy, photograph, or digitally scanned reproduction, and

(2) When used in reference to a sexually explicit depiction means the sexually explicit image itself (e.g., a film, an image posted on a web page, an image taken by a webcam, a photo in a magazine, etc.).

(f) *Internet* means collectively the myriad of computer and telecommunications facilities, including equipment and operating software, which constitute the interconnected world-wide network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocols to such protocol, to communicate information of all kinds by wire or radio.

(g) *Computer site or service* means a computer server-based file repository or file distribution service that is accessible over the Internet, World Wide Web, Usenet, or any other interactive computer service (as defined in 47 U.S.C. 230(f)(2)). Computer site or service includes without limitation, sites or services using hypertext markup language, hypertext transfer protocol, file transfer protocol, electronic mail transmission protocols, similar data transmission protocols, or any successor protocols, including but not limited to computer sites or services on the World Wide Web.

(h) *URL* means uniform resource locator.

(i) *Electronic communications service* has the meaning set forth in 18 U.S.C. 2510(15).

(j) Remote computing service has the meaning set forth in 18 U.S.C. 2711(2).

(k) *Manage content* means to make editorial or managerial decisions concerning the sexually explicit content of a computer site or service, but does not mean those who manage solely advertising, compliance with copyright law, or other forms of non-sexually explicit content.

(l) Interactive computer service has the meaning set forth in 47 U.S.C. 230(f)(2).

Sec. 75.2 Maintenance of records.

(a) Any producer of any book, magazine, periodical, film, videotape, digitally- or computer-manipulated image, digital image, picture, or other matter that contains a depiction of an actual human being engaged in actual sexually explicit conduct that is produced in whole or in part with materials that have been mailed or shipped in interstate or foreign commerce, or is shipped or transported or is intended for shipment or transportation in interstate or foreign commerce and that contains one or more visual depictions of an actual human being engaged in actual sexually explicit conduct made after July 3, 1995 shall, for each performer portrayed in such visual depiction, create and maintain records containing the following:

(1) The legal name and date of birth of each performer, obtained by the producer's examination of a picture identification card. For any performer portrayed in such a depiction made after July 3, 1995, the records shall also include a legible copy of the identification document examined and, if that document does not contain a recent and recognizable picture of the performer, a legible copy of a picture identification card. For any performer portrayed in such a depiction

after June 23, 2005, the records shall include

(i) A copy of the depiction, and

(ii) Where the depiction is published on an Internet computer site or service, a copy of any URL associated with the depiction or, if no URL is associated with the depiction, another uniquely identifying reference associated with the location of the depiction on the Internet.

(2) Any name, other than each performer's legal name, ever used by the performer, including the performer's maiden name, alias, nickname, stage name, or professional name. For any performer portrayed in such a depiction made after July 3, 1995, such names shall be indexed by the title or identifying number of the book, magazine, film, videotape, digitally- or computer-manipulated image, digital image, picture, URL, or other matter. Producers may rely in good faith on representations by performers regarding accuracy of the names, other than legal names, used by performers.

(3) Records required to be created and maintained under this part shall be organized alphabetically, or numerically where appropriate, by the legal name of the performer (by last or family name, then first or given name), and shall be indexed or cross-referenced to each alias or other name used and to each title or identifying number of the book, magazine, film, videotape, digitally- or computer-manipulated image,

digital image, picture, URL, or other matter.

(b) A producer who is a secondary producer as defined in Sec. 75.1(c) may satisfy the requirements of this part to create and maintain records by accepting from the primary producer, as defined in Sec. 75.1(c), copies of the records described in paragraph (a) of this section. Such a secondary producer shall also keep records of the name and address of the primary producer from whom he received copies of the records.

(c) The information contained in the records required to be created and maintained by this part need be current only as of the time the primary producer actually films, videotapes, or photographs, or creates a digitally or computer-manipulated image, digital image, or picture, of the visual depiction of an actual human being engaged in actual sexually explicit conduct. If the producer subsequently produces an additional book, magazine, film, videotape, digitally- or computer-manipulated image, digital image, or picture, or other matter (including but not limited to Internet computer site or services) that contains one or more visual depictions of an actual human being engaged in actual sexually explicit conduct made by a performer for whom he maintains records as required by this part, the producer may add the additional title or identifying number and the names of the performer to the existing records maintained pursuant to Sec. 75.2(a)(2).

(d) For any record created or amended after June 23, 2005, all such records shall be organized alphabetically, or numerically where appropriate, by the legal name of the performer (by last or family name, then first or given name), and shall be indexed or cross-referenced to each alias or other name used and to each title or identifying number of the book, magazine, film, videotape, digitally- or computer-manipulated image, digital image, or picture, or other matter (including but not limited to Internet computer site or services). If the producer subsequently produces an additional book, magazine, film, videotape, digitally- or computer-manipulated image, digital image, or picture, or other matter (including but not limited to Internet computer site or services) that contains one or more visual depictions of an actual human being engaged in actual sexually explicit conduct made by a performer for whom he maintains records as required by this part, the producer shall add the additional title or identifying number and the names of the performer to the existing records and such records shall thereafter be maintained in accordance with this paragraph.

(e) Records required to be maintained under this part shall be segregated from all other records, shall not contain any other records, and shall not be contained within any other records.

(f) Records required to be maintained under this part may be kept either in hard copy or in digital form, provided that they include scanned copies of forms of identification and that there is a custodian of the records who can authenticate each digital record.

Sec. 75.3 Categorization of records.

Records required to be maintained under this part shall be categorized alphabetically, or numerically where appropriate, and retrievable to: All name(s) of each performer, including any alias, maiden name, nickname, stage name or professional name of the performer; and according to the title, number, or other similar identifier of each book, magazine, periodical, film, videotape, digitally- or computer- manipulated image, digital image, or picture, or other matter (including but not limited to Internet computer site or services). Only one copy of each picture of a performer's picture identification card and identification document must be kept as long as each copy is categorized and retrievable according to any name, real or assumed, used by such performer, and according to any title or other identifier of the matter.

Sec. 75.4 Location of records.

Any producer required by this part to maintain records shall make such records available at the producer's place of business. Each record shall be maintained for seven years from the date of creation or last amendment or addition. If the producer ceases to carry on the business, the records shall be maintained for five years thereafter. If the producer produces the book, magazine, periodical, film, videotape, digitally- or computer-manipulated image, digital image, or picture, or other matter (including but not limited to Internet computer site or services) as part of his control of or through his employment with an organization, records shall be made available at the organization's place of business. If the organization is dissolved, the individual who was responsible for maintaining the records on behalf of the organization, as described in Sec. 75.6(b), shall continue to maintain the records for a period of five years after dissolution.

Sec. 75.5 Inspection of records.

(a) *Authority to inspect.* Investigators authorized by the Attorney General (hereinafter "investigators") are authorized to enter without delay and at reasonable times any establishment of a producer where records under Sec. 75.2 are maintained to inspect during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, for the purpose of determining compliance with the record-keeping requirements of the Act and any other provision of the Act (hereinafter "investigator").

(b) *Advance notice of inspections.* Advance notice of record inspections shall not be given.

(c) *Conduct of inspections.*

(1) Inspections shall take place during the producer's normal business hours and at such places as specified in Sec. 75.4. For the purpose of this part, "normal

business hours" are from 9 a.m. to 5 p.m., local time, Monday through Friday, or any other time during which the producer is actually conducting business relating to producing depiction of actual sexually explicit conduct. To the extent that the producer does not maintain at least 20 normal business hours per week, producers must provide notice to the inspecting agency of the hours during which records will be available for inspection, which in no case may be less than twenty (20) hours per week.

(2) Upon commencing an inspection, the investigator shall:

(i) Present his or her credentials to the owner, operator, or agent in charge of the establishment;

(ii) Explain the nature and purpose of the inspection, including the limited nature of the records inspection, and the records required to be kept by the Act and this part; and

(iii) Indicate the scope of the specific inspection and the records that he or she wishes to inspect.

(3) The inspections shall be conducted so as not to unreasonably disrupt the operations of the producer's establishment.

(4) At the conclusion of an inspection, the investigator may informally advise the producer of any apparent violations disclosed by the inspection. The producer

may bring to the attention of the investigator any pertinent information regarding the records inspected or any other relevant matter.

(d) *Frequency of inspections.* A producer may be inspected once during any four-month period, unless there is a reasonable suspicion to believe that a violation of this part has occurred, in which case an additional inspection or inspections may be conducted before the four- month period has expired.

(e) *Copies of records.* An investigator may copy, at no expense to the producer, during the inspection, any record that is subject to inspection.

(f) *Other law enforcement authority.* These regulations do not restrict the otherwise lawful investigative prerogatives of an investigator while conducting an inspection.

(g) *Seizure of evidence.* Notwithstanding any provision of this part or any other regulation, a law enforcement officer may seize any evidence of the commission of any felony while conducting an inspection.

Sec. 75.6 Statement describing location of books and records.

(a) Any producer of any book, magazine, periodical, film, videotape, digitally- or computer-manipulated image, digital image, or picture, or other matter (including but not limited to Internet computer site or services) that contains one or more visual depictions of an actual human being engaged in actual sexually explicit conduct made after July 3, 1995, and produced, manufactured, published, duplicated, reproduced, or reissued on or after July 3, 1995, shall cause to be affixed to every copy of the matter a statement describing the location of the records required by this part. A producer may cause such statement to be affixed, for example, by instructing the manufacturer of the book, magazine, periodical, film, videotape, digitally- or computer- manipulated image, digital image, picture, or other matter to affix the statement.

(b) Every statement shall contain:

(1) The title of the book, magazine, periodical, film, or videotape, digitally- or computer-manipulated image, digital image, picture, or other matter (unless the title is prominently set out elsewhere in the book, magazine, periodical, film, or videotape, digitally- or computer- manipulated image, digital image, picture, or other matter) or, if there is no title, an identifying number or similar identifier that differentiates this matter from other matters which the producer has produced;

(2) The date of production, manufacture, publication, duplication, reproduction, or reissuance of the matter; and, (3) A street address at which the records required by this part may be made available. The street address may be an address specified by the primary producer or, if the secondary producer satisfies the requirements

of Sec. 75.2(b), the address of the secondary producer. A post office box address does not satisfy this requirement.

(c) If the producer is an organization, the statement shall also contain the name, title, and business address of the individual employed by such organization who is responsible for maintaining the records required by this part.

(d) The information contained in the statement must be accurate as of the date on which the book, magazine, periodical, film, videotape, digitally or computer-manipulated image, digital image, picture, or other matter is produced or reproduced.

(e) For the purposes of this section, the required statement shall be displayed in typeface that is no less than 12-point type or no smaller than the second-largest typeface on the material and in a color that clearly contrasts with the background color of the material. For any electronic or other display of the notice that is limited in time, the notice must be displayed for [[Page 322]] a sufficient duration and of a sufficient size to be capable of being read by the average viewer.

Sec. 75.7 Exemption statement.

(a) Any producer of any book, magazine, periodical, film, videotape, digitally- or computer-manipulated image, digital image, picture, or other matter may cause to be affixed to every copy of the matter a statement attesting that the matter is not covered by the record-keeping requirements of 18 U.S.C. 2257(a)-(c) and of this part if:

(1) The matter contains only visual depictions of actual sexually explicit conduct made before July 3, 1995, or is produced, manufactured, published, duplicated, reproduced, or reissued before July 3, 1995;

(2) The matter contains only visual depictions of simulated sexually explicit conduct; or,

(3) The matter contains only some combination of the visual depictions described in paragraphs (a)(1) and (a)(2) of this section.

(b) If the primary producer and the secondary producer are different entities, the primary producer may certify to the secondary producer that the visual depictions in the matter satisfy the standards under paragraphs (a)(1) through (a)(3) of this section. The secondary producer may then cause to be affixed to every copy of the matter a statement attesting that the matter is not covered by the record-keeping requirements of 18 U.S.C. 2257(a)-(c) and of this part.

Sec. 75.8 Location of the statement.

(a) All books, magazines, and periodicals shall contain the statement required in Sec. 75.6 or suggested in Sec. 75.7 either on the first page that appears after the front cover or on the page on which copyright information appears.

(b) In any film or videotape which contains end credits for the production, direction, distribution, or other activity in connection with the film or videotape, the statement referred to in Sec. 75.6 or Sec. 75.7 shall be presented at the end of the end titles or final credits and shall be displayed for a sufficient duration to be capable of being read by the average viewer.

(c) Any other film or videotape shall contain the required statement within one minute from the start of the film or videotape, and before the opening scene, and shall display the statement for a sufficient duration to be read by the average viewer.

(d) A computer site or service or Web address containing a digitally- or computer-manipulated image, digital image, or picture, shall contain the required statement on its homepage, any known major entry points, or principal URL (including the principal URL of a subdomain), or in a separate window that opens upon the viewer's clicking a hypertext link that states, "18 U.S.C. 2257 Record-Keeping Requirements Compliance Statement."

(e) For all other categories not otherwise mentioned in this section, the statement is to be prominently displayed consistent with the manner of display required for the aforementioned categories.

Adam Walsh Child Protection and Safety Act of 2006 Pub. L. 109-248, Title V, §§ 501, 502, 503; 120 Stat. 625, 626

SEC. 501. FINDINGS.

Congress makes the following findings:

(1) The effect of the intrastate production, transportation, distribution, receipt, advertising, and possession of child pornography on the interstate market in child pornography:

(A) The illegal production, transportation, distribution, receipt, advertising and possession of child pornography, as defined in section 2256(8) of title 18, United States Code, as well as the transfer of custody of children for the production of child pornography, is harmful to the physiological, emotional, and mental health of the children depicted in child pornography and has a substantial and detrimental effect on society as a whole.

(B) A substantial interstate market in child pornography exists, including not only a multimillion dollar industry, but also a nationwide network of individuals openly advertising their desire to exploit children and to traffic in child pornography. Many of these individuals distribute child pornography with the expectation of receiving other child pornography in return.

(C) The interstate market in child pornography is carried on to a substantial extent through the mails and other instrumentalities of interstate and foreign commerce, such as the Internet. The advent of the Internet has greatly increased the ease of transporting, distributing, receiving, and advertising child pornography in interstate commerce. The advent of digital cameras and digital video cameras, as well as videotape cameras, has greatly increased the ease of producing child pornography. The advent of inexpensive computer equipment with the capacity to store large numbers of digital images of child pornography has greatly increased the ease of possessing child pornography. Taken together, these technological advances have had the unfortunate result of greatly increasing the interstate market in child pornography.

(D) Intrastate incidents of production, transportation, distribution, receipt, advertising, and possession of child pornography, as well as the transfer of custody of children for the production of child pornography, have a substantial and direct effect upon interstate commerce because:

(i) Some persons engaged in the production, transportation, distribution, receipt, advertising, and possession of child pornography conduct such activities entirely within the boundaries of one state. These persons are unlikely to be content with the amount of child pornography they produce, transport, distribute, receive, advertise, or possess. These persons are therefore likely to enter the interstate market in child pornography in search of additional child pornography, thereby stimulating demand in the interstate market in child pornography.

(ii) When the persons described in subparagraph (D)(i) enter the interstate market in search of additional child pornography, they are likely to distribute the child pornography they already produce, transport, distribute, receive, advertise, or possess to persons who will distribute additional child pornography to them, thereby stimulating supply in the interstate market in child pornography.

(iii) Much of the child pornography that supplies the interstate market in child pornography is produced entirely within the boundaries of one state, is not traceable, and enters the interstate market surreptitiously. This child pornography supports demand in the interstate market in child pornography and is essential to its existence.

(E) Prohibiting the intrastate production, transportation, distribution, receipt, advertising, and possession of child pornography, as well as the intrastate transfer of custody of children for the production of child pornography, will cause some persons engaged in such intrastate activities to cease all such activities, thereby reducing both supply and demand in the interstate market for child pornography.

(F) Federal control of the intrastate incidents of the production, transportation, distribution, receipt, advertising, and possession of child pornography, as well as the intrastate transfer of children for the production of child pornography, is essential to the effective control of the interstate market in child pornography.

(2) The importance of protecting children from repeat exploitation in child pornography:

(A) The vast majority of child pornography prosecutions today involve images contained on computer hard drives, computer disks, and related media.

(B) Child pornography is not entitled to protection under the First Amendment and thus may be prohibited.

(C) The government has a compelling State interest in protecting children from those who sexually exploit them, and this interest extends to stamping out the vice of child pornography at all levels in the distribution chain.

(D) Every instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse.

(E) Child pornography constitutes prima facie contraband, and as such should not be distributed to, or copied by, child pornography defendants or their attorneys.

(F) It is imperative to prohibit the reproduction of child pornography in criminal cases so as to avoid repeated violation and abuse of victims, so long as the government makes reasonable accommodations for the inspection, viewing, and examination of such material for the purposes of mounting a criminal defense.

SEC. 502. OTHER RECORD KEEPING REQUIREMENTS.

(a) In General.– Section 2257 of title 18, United States Code, is amended–

(1) in subsection (a), by inserting after "videotape," the following: "digital image, digitally– or computer-manipulated image of an actual human being, picture,";

(2) in subsection (e)(1), by adding at the end the following: "In this paragraph, the term 'copy' includes every page of a website on which matter described in subsection (a) appears.";

(3) in subsection (f), by–

(A) in paragraph (3), by striking "and" after the semicolon;

(B) in paragraph (4), by striking the period and inserting "; and"; and

(C) by adding at the end the following:

"(5) for any person to whom subsection (a) applies to refuse to permit the Attorney General or his or her designee to conduct an inspection under subsection (c)."; and

(4) by striking subsection (h) and inserting the following:

"(h) In this section–

"(1) the term 'actual sexually explicit conduct' means actual but not simulated conduct as defined in clauses (i) through (v) of section 2256(2)(A) of this title;

"(2) the term 'produces'–

"(A) means–

"(i) actually filming, videotaping, photographing, creating a picture, digital image, or digitally- or computer-manipulated image of an actual human being;

"(ii) digitizing an image, of a visual depiction of sexually explicit conduct; or, assembling, manufacturing, publishing, duplicating, reproducing, or reissuing a book, magazine, periodical, film, videotape, digital image, or picture, or other matter intended for commercial distribution, that contains a visual depiction of sexually explicit conduct; or

"(iii) inserting on a computer site or service a digital image of, or otherwise managing the sexually explicit content, of a computer site or service that contains a visual depiction of, sexually explicit conduct; and

"(B) does not include activities that are limited to–

"(i) photo or film processing, including digitization of previously existing visual depictions, as part of a commercial enterprise, with no other commercial interest in the sexually explicit material, printing, and video duplication;

"(ii) distribution;

"(iii) any activity, other than those activities identified in subparagraph (A), that does not involve the hiring, contracting for, managing, or otherwise arranging for the participation of the depicted performers;

"(iv) the provision of a telecommunications service, or of an Internet access service or Internet information location tool (as those terms are defined in section 231 of the Communications Act of 1934 (47 U.S.C. 231)); or

"(v) the transmission, storage, retrieval, hosting, formatting, or translation (or any combination thereof) of a communication, without selection or alteration of the content of the communication, except that deletion of a particular communication or material made by another person in a manner consistent with section 230(c) of the Communications Act of 1934 (47 U.S.C. 230(c)) shall not constitute such selection or alteration of the content of the communication; and

"(3) the term 'performer' includes any person portrayed in a visual depiction engaging in, or assisting another person to engage in, sexually explicit conduct.".

(b) Construction.– The provisions of section 2257 shall not apply to any depiction of actual sexually explicit conduct as described in clause (v) of section 2256(2)(A) of title 18, United States Code, produced in whole or in part, prior to the effective date of this section unless that depiction also includes actual sexually explicit conduct as described in clauses (i) through (iv) of section 2256(2)(A) of title 18, United States Code.

SEC. 503. RECORD KEEPING REQUIREMENTS FOR SIMULATED SEXUAL CONDUCT.

(a) In General.– Chapter 110 of title 18, United States Code, is amended by inserting after section 2257 the following:

"SEC. 2257A. RECORD KEEPING REQUIREMENTS FOR SIMULATED SEXUAL CONDUCT.

"(a) Whoever produces any book, magazine, periodical, film, videotape, digital image, digitally- or computer-manipulated image of an actual human being, picture, or other matter that–

"(1) contains 1 or more visual depictions of simulated sexually explicit conduct; and

"(2) is produced in whole or in part with materials which have been mailed or shipped in interstate or foreign commerce, or is shipped or transported or is intended for shipment or transportation in interstate or foreign commerce;

shall create and maintain individually identifiable records pertaining to every performer portrayed in such a visual depiction.

"(b) Any person to whom subsection (a) applies shall, with respect to every performer portrayed in a visual depiction of simulated sexually explicit conduct–

"(1) ascertain, by examination of an identification document containing such information, the performer's name and date of birth, and require the performer to provide such other indicia of his or her identity as may be prescribed by regulations;

"(2) ascertain any name, other than the performer's present and correct name, ever used by the performer including maiden name, alias, nickname, stage, or professional name; and

"(3) record in the records required by subsection (a) the information required by paragraphs (1) and (2) and such other identifying information as may be prescribed by regulation.

"(c) Any person to whom subsection (a) applies shall maintain the records required by this section at their business premises, or at such other place as the Attorney General may by regulation prescribe and shall make such records available to the Attorney General for inspection at all reasonable times.

"(d)(1) No information or evidence obtained from records required to be created or maintained by this section shall, except as provided in this section, directly or indirectly, be used as evidence against any person with respect to any violation of law.

"(2) Paragraph (1) shall not preclude the use of such information or evidence in a prosecution or other action for a violation of this chapter or chapter 71, or for a violation of any applicable provision of law with respect to the furnishing of false information.

"(e)(1) Any person to whom subsection (a) applies shall cause to be affixed to every copy of any matter described in subsection (a)(1) in such manner and in such form as the Attorney General shall by regulations prescribe, a statement describing where the records required by this section with respect to all performers depicted in that copy of the matter may be located. In this paragraph, the term 'copy' includes every page of a website on which matter described in subsection (a) appears.

"(2) If the person to whom subsection (a) applies is an organization the statement required by this subsection shall include the name, title, and business address of the individual employed by such organization responsible for maintaining the records required by this section.

"(f) It shall be unlawful–

"(1) for any person to whom subsection (a) applies to fail to create or maintain the records as required by subsections (a) and (c) or by any regulation promulgated under this section;

"(2) for any person to whom subsection (a) applies knowingly to make any false entry in or knowingly to fail to make an appropriate entry in, any record required by subsection (b) or any regulation promulgated under this section;

"(3) for any person to whom subsection (a) applies knowingly to fail to comply with the provisions of subsection (e) or any regulation promulgated pursuant to that subsection; or

"(4) for any person knowingly to sell or otherwise transfer, or offer for sale or transfer, any book, magazine, periodical, film, video, or other matter, produced in whole or in part with materials which have been mailed or shipped in interstate or foreign commerce or which is intended for shipment in interstate or foreign commerce, that--

"(A) contains 1 or more visual depictions made after the date of enactment of this subsection of simulated sexually explicit conduct; and

"(B) is produced in whole or in part with materials which have been mailed or shipped in interstate or foreign commerce, or is shipped or transported or is intended for shipment or transportation in interstate or foreign commerce;

which does not have affixed thereto, in a manner prescribed as set forth in subsection (e)(1), a statement describing where the records required by this section may be located, but such person shall have no duty to determine the accuracy of the contents of the statement or the records required to be kept.

"(5) for any person to whom subsection (a) applies to refuse to permit the Attorney General or his or her designee to conduct an inspection under subsection (c).

"(g) As used in this section, the terms 'produces' and 'performer' have the same meaning as in section 2257(h) of this title.

"(h)(1) The provisions of this section and section 2257 shall not apply to matter, or any image therein, containing one or more visual depictions of simulated sexually explicit conduct, or actual sexually explicit conduct as described in clause (v) of section 2256(2)(A), if such matter--

"(A)(i) is intended for commercial distribution;

"(ii) is created as a part of a commercial enterprise by a person who certifies to the Attorney General that such person regularly and in the normal course of business collects and maintains individually identifiable information regarding all performers, including minor performers, employed by that person, pursuant to Federal and State tax, labor, and other laws, labor agreements, or otherwise pursuant to industry standards, where such information includes the name, address, and date of birth of the performer; and

"(iii) is not produced, marketed or made available by the person described in clause (ii) to another in circumstances such than an ordinary person would conclude that the matter contains a visual depiction that is child pornography as defined in section 2256(8); or

"(B)(i) is subject to the authority and regulation of the Federal Communications Commission acting in its capacity to enforce section 1464 of this title, regarding the broadcast of obscene, indecent or profane programming; and

"(ii) is created as a part of a commercial enterprise by a person who certifies to the Attorney General that such person regularly and in the normal course of business collects and maintains individually identifiable information regarding all performers, including minor performers, employed by that person, pursuant to Federal and State tax, labor, and other laws, labor agreements, or otherwise pursuant to industry standards, where such information includes the name, address, and date of birth of the performer.

"(2) Nothing in subparagraphs (A) and (B) of paragraph (1) shall be construed to exempt any matter that contains any visual depiction that is child pornography, as defined in section 2256(8), or is actual sexually explicit conduct within the definitions in clauses (i) through (iv) of section 2256(2)(A).

"(i)(1) Whoever violates this section shall be imprisoned for not more than 1 year, and fined in accordance with the provisions of this title, or both.

"(2) Whoever violates this section in an effort to conceal a substantive offense involving the causing, transporting, permitting or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct in violation of this title, or to conceal a substantive offense that involved trafficking in material involving the sexual exploitation of a minor, including receiving, transporting, advertising, or possessing material involving the sexual exploitation of a minor with intent to traffic, in violation of this title, shall be imprisoned for not more than 5 years and fined in accordance with the provisions of this title, or both.

"(3) Whoever violates paragraph (2) after having been previously convicted of a violation punishable under that paragraph shall be imprisoned for any period of years not more than 10 years but not less than 2 years, and fined in accordance with the provisions of this title, or both.

"The provisions of this section shall not become effective until 90 days after the final regulations implementing this section are published in the Federal Register. The provisions of this section shall not apply to any matter, or image therein, produced, in whole or in part, prior to the effective date of this section.

"(k) On an annual basis, the Attorney General shall submit a report to Congress--

"(1) concerning the enforcement of this section and section 2257 by the Department of Justice during the previous 12-month period; and

"(2) including--

"(A) the number of inspections undertaken pursuant to this section and section 2257;

"(B) the number of open investigations pursuant to this section and section 2257;

"(C) the number of cases in which a person has been charged with a violation of this section and section 2257; and

> "(D) for each case listed in response to subparagraph (C), the name of the lead defendant, the federal district in which the case was brought, the court tracking number, and a synopsis of the violation and its disposition, if any, including settlements, sentences, recoveries and penalties.".

(b) Chapter Analysis.– The chapter analysis for chapter 110 of title 18, United States Code, is amended by inserting after the item for section 2257 the following:

"2257A.